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OPINION, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (SEPTEMBER 18, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DARRELL EUGENE CLARK; REGINALD DAVID COOPER; CEDRIC LINBERT GREEN,

Plaintiffs-Appellants,

v.

CITY OF ALEXANDRIA; DARYL LOUIS TERRY; JARROD DANIEL KING; PATRICK RAMON VANDYKE; CHRISTOPHER LOUIS COOPER,

Defendants-Appellees.

No. 23-30732

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 1:20-CV-1581

Before: JONES, SMITH, and HO,
Circuit Judges.

JERRY E. SMITH, *Circuit Judge*:

Cedric Green, Darrell Clark, and Reginald Cooper, one demoted and two former police officers, appeal a litany of rejected employment discrimination claims against the City of Alexandria. The district court

granted summary judgment to the city primarily because the plaintiffs failed to present competent summary judgment evidence. We affirm: Plaintiffs' citations to the complaint are not evidence, and the proffered evidence cannot hurdle summary judgment's evidentiary bar.

I

This case arises out of an alleged thirty-plus-year history of "intentional and systemic" discrimination against black officers in the Alexandria Police Department ("APD").[1] Clark, Cooper, and Green spent 28, 32, and 30 years, respectively, with APD before Clark's and Cooper's terminations and Green's demotion.[2] They allege that over those years, many officers and supervisors—including Jerrod King, the Chief of Police between May 2018 and November 2020—repeatedly demeaned, belittled, and attacked them on the basis of their race.

The APD Chief is an appointed position, but the remaining command staff positions are seniority-based. By 2019, black officers held each of those seniority-based positions. In one of the complained-of statements, at least one officer referred to that all-black command staff as the "colored coalition." And, according

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[1] Many of the plaintiffs' factual assertions are relevant to specific claims discussed below. But this section will lay out the main details.

[2] Clark had reached the level of Lieutenant and Commander of the APD Narcotics Division before being fired; Cooper reached Assistant Chief before his termination; and Green reached Deputy Chief before returning to being a Lieutenant upon the defunding of the Deputy Chief position and his subsequent demotion to Sergeant.

to the plaintiffs, King began to circumvent his command staff at roughly the same time, relying instead on white officers further down the pecking order.

Fed up with King's behavior, Clark, Cooper, and Green filed HR complaints against King in 2019, alleging harassment and a hostile work environment. The city pulled King off duty for a few months to investigate those claims.

In March 2020, during King's leave, the plaintiffs filed a report with the FBI unrelated to their complaints against King. They had become aware of an incident involving another APD officer, Kenny Rachal, who had beat, pistol-whipped, and choked an unarmed black suspect, Daquarious Brown. In plaintiffs' view, APD had not investigated the incident sufficiently, and they believed that the failure was indicative of APD's even deeper racial issues.

Shortly after their FBI report, King returned to active duty. On his return, APD began to investigate plaintiffs over allegedly minor or fictitious infractions, proceeding to find novel justifications to discipline them.[3] Armed with the results of those investigations, the city fired Clark and Cooper and demoted Green.[4]

The city justified Clark's firing by claiming he had misused the police department's Thinkstream platform, accessing it for "non-APD purposes on multiple instances" in violation of "well-established rules and

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[3] They had relatively little, if any, disciplinary history.

[4] APD terminated Clark on June 25, 2020. A month later, it let Cooper go. Then, over six months later, it demoted Green.

regulations . . . and state statutes."[5] Allegedly, he had run inquiries on King and fourteen other individuals for various personal purposes, despite that APD Rule #609.5 expressly prohibited such personal inquiries.

The city dismissed Cooper because he had impermissibly disseminated police information and used or accessed city resources, equipment, and/or authority. Specifically, in an interrogation, Cooper had denied providing city information to anyone outside the department—but a polygraph showed that to be a lie—and he had improperly contacted the mother of a person involved in a lawsuit against the city.

Finally, the city demoted Green because he had given Cooper, by then a former officer, an employment list containing the home address and personal phone number of every APD officer—and then he lied about it in an investigation. He recanted that lie in the pre-polygraph interview several days later, but he had not volunteered the correction before then.

Plaintiffs believed that the investigations were mere pretexts to justify their firings and demotion, describing them as the culmination of years of discrimination and as retaliation for their HR complaints and FBI report. So, they filed unsuccessful discrimination claims with the EEOC. Plaintiffs sued, alleging a litany of unlawful actions by a variety of actors.[6]

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[5] Thinkstream provided access to the Louisiana Law Enforcement Telecommunications System ("LLETS"), and the FBI's National Crime Information Center ("NCIC").

[6] Several plaintiffs and defendants included in the Third Amended Complaint ("TAC") are not on this appeal. Clark, Cooper, and Green also brought a wiretapping claim under 18 U.S.C. § 2511 that they do not pursue on appeal. Their complaint included (1)

They described the discrimination in APD as "persistent, historical, and widespread" such that it became "so common and well-settled as to constitute a custom that fairly represent[ed] the APD's policy."

In a thorough and detailed 34-page order, the district court granted summary judgment to the defendants in full. Clark, Cooper, and Green appeal, maintaining only their claims against the city.

II

We review summary judgments *de novo*, viewing all facts and drawing all inferences in the light most favorable to the nonmoving party. *Brandon v. Sage Corp.*, 808 F.3d 266, 269–70 (5th Cir. 2015) (citations omitted). We affirm a summary judgment where the nonmovant shows "no genuine dispute as to any material fact . . . . " FED. R. Civ. P. 56(a). To make a showing of a genuine dispute of material fact, "the party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim."[7] "A fact is material only if its resolution would affect the outcome of the action, and

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unlawful discrimination under 42 U.S.C. §§ 1981 and 1983, Title VII, the Louisiana Employment Discrimination Law ("LEDL"), La. R.S. 23:332, and the Louisiana Human Rights Act, La. R.S. 51:2231; (2) a hostile work environment under Title VII; and (3) retaliation in violation of the First and Fourteenth Amendments, § 1983, and the Louisiana whistleblower statute, La. R.S. § 23:967.

[7] *Diaz v. Kaplan Higher Educ., L.L.C.*, 820 F.3d 172, 176 (5th Cir. 2016) (emphasis omitted) (quoting *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998)); *see also Owens v. Circassia Pharms., Inc.*, 33 F.4th 814, 824 (5th Cir. 2022); *Willis v. Cleco Corp.*, 749 F.3d 314, 317 (5th Cir. 2014).

an issue is genuine only if the evidence is sufficient for a reasonable party to return a verdict for the nonmoving party." *Brandon*, 808 F.3d at 269 (internal quotation marks and citation omitted).

III

Plaintiffs assert the court erred by granting summary judgment on the (A) hostile work environment; (B) retaliation; (C) whistleblower; (D) discrimination; and (E) *Monell* claims. We address each in turn.

A. The Hostile Work Environment Claims

"A hostile work environment claim is composed of a series of separate acts that collectively constitute one unlawful employment practice."[8] To succeed, the plaintiff must show that

> (1) the employee belonged to a protected class; (2) the employee was subject to unwelcome harassment; (3) the harassment was based on the protected class; (4) the harassment affected a "term, condition, or privilege" of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action.[9]

Harassment generally takes the form of "discriminatory intimidation, ridicule, and insult" that rises to

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[8] *Wantou v. Wal-Mart Stores Tex., L.L.C.*, 23 F.4th 422, 433 (5th Cir. 2022) (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 106 (2002)), *cert. denied*, 143 S. Ct. 745 (2023).

[9] *Bye v. MGM Resorts Int'l, Inc.*, 49 F.4th 918, 923 (5th Cir. 2022), *cert. dismissed*, 143 S. Ct. 1102 (2023) (cleaned up); *see also Wantou*, 23 F.4th at 433 (quoting *West v. City of Hous.*, 960 F.3d 736, 741–42 (5th Cir. 2020)).

the level of "hostile or abusive."[10] But an "environment so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, merely presents an especially egregious example of harassment. It does not mark the boundary of what is actionable." *Harris*, 510 U.S. at 22 (cleaned up).

"For harassment to affect a term, condition, or privilege of employment, it 'must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Wantou*, 23 F.4th at 433 (quoting *West*, 960 F.3d at 741–42). The plaintiff must show subjective awareness of the hostility or abusiveness and that his awareness is objectively reasonable. *Id.* (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998)).

We consider "[t]he totality of the employment circumstances [to] determine[] whether an environment is objectively hostile." *West*, 960 F.3d at 742 (citing *Harris*, 510 U.S. at 23). Relevant considerations include (1) "the frequency of the discriminatory conduct"; (2) "its severity"; (3) "whether it is physically threatening or humiliating, or a mere offensive utterance"; and (4) "whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. "No single factor is determinative[,]" but "a single incident . . . , if sufficiently severe, could give rise to a viable Title VII claim as well as a continuous pattern of much less severe incidents of harassment." *EEOC v. WC&M*

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[10] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 22 (1993) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)).

Enters., Inc., 496 F.3d 393, 400 (5th Cir. 2007) (citations omitted).

1. Clark

The court rejected Clark's claims because, of his nine allegations, (1) most bore no relation to race; (2) two involved harassment directed at someone other than him; and (3) the one comment King made that related to race and was directed, at least in part, at Clark, could not, standing alone, establish a claim of a hostile work environment sufficient to survive summary judgment.

Clark responds by pointing to several claims in the complaint about the use of racial epithets and to his deposition, where he asserted various claims of race-based hostility. But "conclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden in a motion for summary judgment."[11] So, as the city points out, Clark's complaint does not count as summary judgment evidence, nor do his motions or responses. *See Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996).

Because Clark's motion for summary judgment rests almost entirely on his complaint, the court may have construed Clark's claims too generously. Still, even if we do the same and consider his affidavit and deposition, he has not provided sufficient evidence of a hostile work environment.

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[11] *Ramsey v. Henderson*, 286 F.3d 264, 269 (5th Cir. 2002) (internal quotation marks and citation omitted); *see also Ragas*, 136 F.3d at 458 (discussing the *Celotex* trilogy's summary judgment standards and quoting *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915–16 & n.7 (5th Cir. 1992)).

Clark's affidavit contains the following broadly-described claims: (1) that white officers received better positions than black officers; (2) that white officers received better uniforms and equipment than black officers; (3) that white officers were punished less severely than black officers, *e.g.*, Sergeant Nassif's demotion was overturned after he called a Patrolman "monkey boy"; (4) that Clark had been unfairly dismissed; and (5) that racial bias led to circumvention of his commands. Similarly, Clark's deposition asserts that (6) King permitted the "colored coalition" comment; (7) APD did not hire or promote many black officers; (8) King circumvented those black officers high up in the chain of command, including Clark; (9) King "allowed Van Dyke [sic] and Cooper," two other black officers (and since-dismissed defendants), to verbally attack Clark while King "stood there and grinned at it"; (10) King held a meeting and looked at Clark during it in a "harassing" way; and (11) Clark had been terminated for an activity that other officers did and for which they "only got one-day's suspension."

Few of the allegations allege any kind of harassment. Most relevant is that King permitted an APD officer to make the "colored coalition" comment without reprimand. That comment was racially motivated, directed at Clark, and—as the district court noted—both "objectively and subjectively offensive." Much weaker is the verbal abuse Vandyke and Cooper inflicted on Clark, who offers no evidence that their words or actions carried any racial animus. Finally, Clark submits that King stared at him in a harassing way during King's first meeting back from his HR suspension. But King had perfectly understandable, non-racial, justifications for his "harassing stare"—

King and Clark had not gotten along since King's time as a probationary sergeant, and then Clark had filed an HR complaint against King, leading to King's suspension. Whatever the merit or subject matter of the HR complaint, the evidence supports that King singled out Clark for a "harassing stare" because of that complaint and their history, not because of Clark's race.

Combined, we find no reason to disturb the district court's reasoned and thoughtful analysis of Clark's claims. First, many of Clark's allegations fail to assert harassment. Second, of those allegations that rise to the level of harassment, Clark offers no evidence supporting a claim that they were racially charged.[12] Third, and finally, the remaining "colored coalition" and "monkey boy" allegations fail to rise to the level of a hostile work environment as required by our precedent.[13] The two statements are "unrelated instances of alleged harassment by different individuals," and, though highly demeaning, "were not physically threatening." *Price v. Valvoline, L.L.C.*, 88 F.4th 1062, 1067 (5th Cir. 2023). Instead, the one statement made about Clark, and the other made to and about someone else, fall more in the bucket of

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[12] *See Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 654 (5th Cir. 2012) (We "do not consider the various incidents of harassment not based on race.").

[13] *See Molden v. E. Baton Rouge Par. Sch. Bd.*, 715 F. App'x 310, 316 (5th Cir. 2017) (noting that our "standard for workplace harassment in this circuit is . . . high" (omission in original) (quoting *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 509 (5th Cir. 2003)); *see also Wantou*, 23 F.4th at 433; *White v. Gov't Emps. Ins. Co.*, 457 F. App'x 374, 381 n.35 (5th Cir. 2012); *Collier v. Dall. Cnty. Hosp. Dist.*, 827 F. App'x 373, 377–78 (5th Cir. 2020).

"offensive utterances." *Wantou*, 23 F.4th at 433 (cleaned up). And, finally, Clark proffers no evidence that those statements interfered with his ability to do his job.

In sum, Clark has not presented sufficient summary judgment evidence to establish a genuine dispute of material fact. Therefore, the court properly granted summary judgment on his hostile work environment claim.

2. Cooper

The court similarly dismissed Cooper's claims, noting that several were thoroughly unrelated to race and two of the racially offensive comments did not affect a term, condition, or privilege of his employment. The court took more time to assess Cooper's allegation that an APD officer overtly referenced the KKK and called him the n-word. As Cooper recounts it, in 2014 or 2015 a white captain embarrassed Cooper (then at the lower rank of sergeant) by publicly suggesting he should not have made sergeant. Then, driving home the incident's racial component, one of the white sergeants in the room asked the captain to show Cooper "the silver dollar in [his] pocket."[14] After the captain left the room, one of the other sergeants shouted at Cooper "look out n * * * * * , the Klan is getting bigger." Cooper contends that that incident, combined with the day-to-day racism he experienced

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14 "The Silver Dollar Group was an offshoot of the Ku Klux Klan white nationalist terrorist group, composed of cells that took up violent actions to support Klan goals. The group was largely found in Mississippi and Louisiana and was named for their practice of identifying themselves by carrying a silver dollar." *Silver Dollar Group*, WIKIPEDIA, https://en.wikipedia.org/wiki/Silver_Dollar_Group (last edited Feb. 8, 2024).

over his long career, suffices to show a hostile work environment.

The district court accurately described that incident as "humiliating, highly offensive, and . . . undoubtedly warrant[ing] discipline." Still, one incident over Cooper's 30-year career with the APD—well before his promotion to Assistant Chief—suggested that it did not affect any term of his employment. So, Cooper had provided "insufficient evidence of severe or pervasive conduct altering the conditions of his employment."

We agree. Cooper never reported the silver-dollar incident to his superiors, HR, or the city. The event, severe as it was, occurred only once and did not seem "unreasonably [to] interfere[] with [his] work performance." *Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 194 (5th Cir. 1996) (citation omitted). Then, his remaining allegations largely generalize harassing statements and incidents that only occasionally centered on race. Those claims, though problematic, do not clear the bar of "conduct that is so severe and pervasive that it destroys a protected classmember's opportunity to succeed in the workplace." *Id.* (citing *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 593 (5th Cir. 1995)).

Therefore, the court properly granted summary judgment on Cooper's hostile work environment claim.

3. Green

The court likewise dismissed Green's claims of a hostile work environment. It explained that "[d]espite being offensive and warranting discipline, four of Green's five allegations relate to the harassment of someone other than Green[, so they] are of limited evi-

dentiary value." Then, it declared that, despite the one "trunk monkey" comment directed at him, "Green does not allege harassment that is 'severe or pervasive' enough to 'affect a term, condition, or privilege' of his employment, particularly when considered against the backdrop of Green's roughly 30-year-long tenure with the APD and eventual promotion to Deputy Chief."

On appeal, Green disputes the court's weighing of the allegations of harassment of others and highlights some of the allegations he made in his affidavit. But our independent review confirms that Green presented insufficient summary judgment evidence to rescue his claim. Unlike Clark, Green at least identifies *some* valid summary judgment evidence, detailing several racist incidents. But, only one such harassing incident was directed at Green–the "trunk monkey" incident.[15] Even combining that with the discriminatory "chicken and watermelon" incident,[16] Green's claim still lacks even the reprehensible statements and behaviors seen in Cooper's claim, and he presents no other competent evidence of repeated, low-level, racist behavior that would be necessary to raise his claim from occasional "offensive utterances" to an "abusive or hostile" envi-

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[15] The allegations that APD did not hire minority candidates and that King refused to reappoint Green because of insufficient loyalty are not allegations of harassment. Therefore, we need not address them.

[16] Green, in his affidavit, alleges that another black officer, "Vincent Parker, . . . had a watermelon left in his vehicle because he refused to purchase a dinner a white officer was selling. The white officer then brought a box of chicken to roll call and placed it in front of Officer Parker and stated 'I heard you people like chicken and watermelon.'"

ronment. So, he has not shown a severe or pervasive enough hostile work environment under our precedent.[17]

Therefore, we affirm the summary judgment on Green's claim of a hostile work environment.

B. The Retaliation Claims[18]

"As a general matter, the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech." *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019) (cleaned up). To succeed on a First Amendment retaliation claim, the plaintiff "must show that (1) he suffered an adverse employment decision; (2) his speech involved a matter of public concern; (3) his interest in commenting on matters of public concern outweighs the [d]efendant's interest in promoting efficiency; and (4) his speech motivated the adverse employment decision." *Beattie v. Madison Cnty. Sch. Dist.*, 254 F.3d 595, 601 (5th Cir. 2001) (cleaned up).

Making that showing establishes a presumption of retaliation, but the defendant may still rebut it by showing "by a preponderance of the evidence that they would have come to the same conclusion in the absence of the protected conduct." *Id.* (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. P. Doyle*, 429 U.S. 274, 287 (1977)). A plaintiff may then "refute that showing by evidence that his employer's ostensible explanation

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17 *See supra* note 13 (collecting cases).

18 Plaintiffs pursue only a First Amendment retaliation claim, not a Title VII claim. So, we analyze only that claim.

for the discharge is merely pretextual." *Coughlin P. Lee*, 946 F.2d 1152, 1157 (5th Cir. 1991).

The court dismissed the plaintiffs' claims after making three findings: First, that the plaintiffs had not presented any direct evidence of retaliation. Plaintiffs do not challenge that ruling. Second, that the plaintiffs "have [not] identified any evidence as to *when* they allegedly reported this conduct to . . . the FBI or *when* the APD learned of this alleged contact." Thus, plaintiffs had not presented enough evidence "from which a jury could infer a causal connection between [plaintiffs'] contact with . . . the FBI and their respective adverse employment actions." Third, that the city had rebutted any *prima facie* case the plaintiffs may have established because the city presented legitimate, non-retaliatory justifications for each adverse action: (1) Clark misused Thinkstream, (2) Cooper failed a polygraph, and (3) Green lied during an Internal Affairs investigation.

Plaintiffs respond by citing—for the first time—Cooper's Pre-Disciplinary Hearing transcript, where Cooper stated that the plaintiffs had gone to the FBI in late March 2020.[19] And, as the plaintiffs claim, the retaliatory investigations began in April 2020. That

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[19] As in the harassment section of their brief, plaintiffs rely extensively on the TAC. As in the harassment section of this opinion, we do not address those claims or citations because a complaint is not competent summary judgment evidence, and it is not the court's role to comb through the record to find support for their claims.

sequence of events could have created a plausible inference of causation.[20]

But, shortly after linking those, plaintiffs undercut their assertions entirely, pointing out that the city learned about the FBI report *during the investigations*. In other words, the plaintiffs' own evidence states that the FBI report did not motivate the investigations. They have presented a chronology that leads to the inescapable conclusion that King and APD were investigating Clark, Cooper, and Green before they found out about the report to the FBI.[21] Therefore, the claims of First Amendment retaliation cannot survive.

* * * * *

Even if plaintiffs had shown that their "speech motivated the adverse employment decision[,]" establishing a presumption of retaliation, the city has rebutted it by offering non-retaliatory reasons, and the plaintiffs have not shown pretext. *Beattie*, 254 F.3d at 601. We address each plaintiff's failure in turn.

1. Clark

Clark contends that, after reporting to the FBI his suspicions of Rachal's alleged use of excessive force

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[20] *See Brady v. Hous. Indep. Sch. Dist.*, 113 F.3d 1419, 1424 (5th Cir. 1997); *see also Mooney v. Lafayette Cnty. Sch. Dist.*, 538 F. App'x 447, 454–55 (5th Cir. 2013).

[21] Plaintiffs point nowhere else but Cooper's Pre-Disciplinary hearing on July 15, 2020, to establish that the City knew of the FBI report. So, the district court likely correctly concluded that no jury "could infer a causal connection between Clark, Cooper, and Green's contact with . . . the FBI and their respective adverse employment actions."

against Brown, APD subjected him to "a 60-day illegal investigation[,] . . . placed [him] on administrative leave, [and then] questioned, polygraphed, and terminated [him]." In that investigation, attorneys apparently accused him of "helping Daquarious Brown to obtain an attorney, giving information to others outside the APD, and aiding in a federal lawsuit against the [c]ity . . . . " Later, APD interrogated Clark over his use of Thinkstream, accusing him "of using the system for personal use or gain in violation of state usage rules." Eventually, the city fired him for that misuse of Thinkstream. All of that, he claims, occurred in retaliation for his FBI report.

To rebut that claim of retaliation, the city relies on former APD Chief Ronney Howard's testimony that "[a]n APD officer found to have repeatedly misused the NCIC and LLETS information systems would be terminated regardless of any other reason." But Clark contends that the investigations were pretextual, pointing to the fact that no "senior officer of the rank of Lieutenant and above [was] ever placed on administrative leave, investigated, polygraphed, or terminated" besides those who complained to HR about King's behavior.

Clark's pretext claim stretches a bridge too far. In essence, it asks us to believe that other similarly situated high-ranking APD officers misused Thinkstream and that they were not fired. Yet he offers no evidence whatsoever. Instead, he pivots and suggests that two wrongs make a right, contending that another officer falsified other officers' Thinkstream exam data without punishment, so Clark's misuse was also permitted.

We disagree with that characterization. Misuse for personal gain and misuse that enables officers to continue to use Thinkstream for legitimate investigations are apples and oranges. Clark has presented no evidence of any similarly situated officers to rebut the city's non-retaliatory justification.

2. Cooper

To allege pretext around his firing for lying during a polygraph, Cooper points exclusively to his and other plaintiffs' testimony that "APD's use of polygraphers was unreliableand motivated by retaliation, as well as alleging the general unreliability of polygraphs." That self-serving testimony nowhere suggests that the investigation into his improper activities was pretextual[22]—nor has he cited any evidence suggesting his activities were proper.

In other words, Cooper offers no evidence at all. Further, as the city notes, the Louisiana Supreme Court has permitted the use of polygraph results in civil service disputes. *See Evans v. DeRidder Mun. Fire*, 815 So. 2d 61, 66–69 (La. 2002).

Therefore, Cooper has not rebutted the city's non-retaliatory justification for his firing or shown pretext.

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[22] *See Jones v. Gulf Coast Rest. Grp., Inc.*, 8 F.4th 363, 369 (5th Cir. 2021) ("[T]his court has held that a plaintiff's summary judgment proof must consist of more than 'a mere refutation of the employers legitimate nondiscriminatory reason.' 'Merely disputing' the employer's assessment of the plaintiff's work performance 'will not necessarily support an inference of pretext.'" (internal citations omitted)).

3. Green

Green recounts a litany of activities unsupported by summary judgment evidence—but repeatedly referencing the TAC—before finally asserting that "there is no evidence [he] lied . . . as he explained that the variance in his statements were [sic] due to his having . . . review[ed] his notes and refresh[ed] his memory."

We reject that specious claim. Green did not come forward to correct the record on his own; instead, he just changed his tune in a later interrogation, in the face of a polygraph. Either he lied the first time, or he lied the second, but either way, he lied. The city has offered a rational, nonretaliatory reason for his demotion, and Green's repeated claim that whether he lied presents a genuine dispute of material fact holds no water.

Otherwise, Green offers no new evidence that the dismissal for lying was mere pretext, and he certainly does not offer enough to rebut the city's nondiscriminatory justifications.[23]

C. The Whistleblower Claims

Plaintiffs' whistleblower claims rest on Louisiana's whistleblower statute, La. R.S. 23:967(A), which "provides protection to employees against reprisal from employers for reporting or refusing to participate in illegal work practices," *Hale P. Touro Infirmary*, 886 So. 2d 1210, 1214 (La. App. 4th Cir. 2004). To succeed on such a claim, the plaintiffs must establish that (1)

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[23] *Cf. id.* at 368–69 (requiring "substantial evidence" to make a showing of pretext and such a showing for "*each* of the nondiscriminatory reasons the employer articulates").

the employer "violated the law through a prohibited workplace act or practice;" (2) the plaintiff advised the employer of the violation; (3) the plaintiff "then refused to participate in the prohibited practice or threatened to disclose the practice;" and (4) the employer fired the plaintiff because of his "refusal to participate in the unlawful practice or threat to disclose the practice." *Id.* at 1216.

The district court granted summary judgment on those claims in a footnote. As it explained, the claims arise "from [the plaintiffs'] disclosure of this same alleged 'civil rights violation'" as the First Amendment claims. But, for the same reasons that the First Amendment claims failed, specifically the failure to point to any causal chain, the whistleblower claims failed too.

The plaintiffs contend the court erred because, unlike in the case the district court relied on, *Hale*, the plaintiffs here "have not failed to establish a violation of the law . . . . " Then, they rest on their First Amendment retaliation claims to support the causal chain for the whistleblower claims.

But, as discussed above, the plaintiffs have failed to establish a violation of the First Amendment. And, as the city notes, plaintiffs have not shown any independent basis for reversal beyond the claimed First Amendment violation. Therefore, we affirm the summary judgment on the whistle-blower claims.

D. The Discrimination Claims

Clark, Cooper, and Green bring discrimination claims under Title VII, Section 1981, and the LEDL, each of which prohibits racial discrimination in em-

ployment. The district court applied the three-part *McDonnell Douglass* analysis and held that none of the plaintiffs could satisfy the first part's fourth prong—that they were "either replaced by someone outside his protected group or . . . treated less favorably than similarly situated employees outside the protected group." *See Johnson P. Iberia Med. Ctr. Found.*, 2023 WL 1090167, at *9 (W.D. La. Jan 27, 2023). We agree.

Because the LEDL "is similar in scope to the federal prohibition against discrimination set forth in Title VII . . . , Louisiana courts have looked to the jurisprudence construing the federal statute . . . . "[24]

"A plaintiff who can offer sufficient direct evidence of intentional discrimination should prevail. . . . However, because direct evidence of discrimination is rare, the Supreme Court has devised an evidentiary procedure that allocates the burden of production and establishes an orderly presentation of proof in discrimination cases."[25] Under that "evidentiary procedure," Clark, Cooper, and Green first must make a *prima facie* showing of discrimination by proving they "(1) are members of a protected group; (2) were qualified for the position at issue; (3) were discharged or

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[24] *Bustamento P. Tucker*, 607 So. 2d 532, 539 n.9 (La. 1992); *see also DeCorte P. Jordan*, 497 F.3d 433, 437 (5th Cir. 2007) ("Claims of racial discrimination in employment, pursuant to 42 U.S.C. § 1981 and the Louisiana Employment Discrimination Law, are governed by the same analysis as that employed for such claims under Title VII." (citations omitted)).

[25] *Nichols P. Loral Vought Sys. Corp.*, 81 F.3d 38, 40 (5th Cir. 1996) (citing *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

suffered some adverse employment action by the employer; and (4) were replaced by someone outside their protected group or were treated less favorably than other similarly situated employees outside the protected group."[26] Only the fourth prong is at issue here.

The plaintiff does not meet the fourth prong where "his former duties are distributed among other co-workers." *Ernst v. Methodist Hosp. Sys.*, 1 F.4th 333, 339 (5th Cir. 2021) (internal quotation marks and citation omitted). Additionally, if he claims less favorable treatment, he must "point to a comparator who was 'similarly situated' and received more favorable treatment under nearly identical circumstances." *Id.* at 340 (cleaned up).

Upon the plaintiff's making that *prima facie* showing, the defendant may rebut it "by articulating a legitimate, nondiscriminatory reason for [its] actions." *DeCorte*, 497 F.3d at 437 (citation omitted). If the defendant does so, the plaintiff must show that the defendant's "proffered reason is [merely] a pretext for discrimination." *Id.*

1. Clark

The district court rejected Clark's claim because the only fellow employee whom Clark identified as treated differently for his use of Think-stream, Corporal Fairbanks, was (1) supervised by someone other than Clark's supervisor, (2) two ranks lower than Clark, and (3) held a dramatically different role. In sum, the

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[26] *McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir. 2007) (cleaned up), *abrogated by Hamilton v. Dall. Cnty.*, 79 F.4th 494 (5th Cir. 2023).

court found, "given the drastic differences in their positional status, Clark and Corporal Fairbanks are not similarly situated."[27]

Clark does not attempt to rebut that claim,[28] resting instead on his assertion that caselaw permits him to survive summary judgment if he proves that his discharge was on account of race. Clark submits no such evidence, though. He provides a detailed recount of his career and the events leading up to his termination, and he suggests that other officers' wrongful behavior went unpunished. But he makes no showing that his termination had anything to do with race. In essence, he presents nothing more than a repackaging of his hostile work environment claim. That claim failed, and so too does this one.[29]

2. Cooper

The court granted summary judgment because Cooper provided no evidence that he was either replaced outside his protected group or treated less favorably than similarly situated employees outside the protected group. Like Clark, Cooper contends that the history of racism in APD and King's "disdain for commanding black officers" show that his termination was motivated by race.

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[27] *See Saketkoo v. Adm'rs of Tulane Educ. Fund*, 31 F.4th 990, 999 (5th Cir. 2022); *Ernst*, 1 F.4th at 340; *Hinga v. MIC Grp., L.L.C.*, 609 F. App'x 823, 827 (5th Cir. 2015).

[28] He would fail if he tried.

[29] Even if Clark had made out a *prima facie* claim, he makes no independent attempt to show pretext. For the same reasons his pretext claims failed earlier, they would fail here.

But Cooper, also like Clark, offers no tie between the asserted daily racism and his termination. Like Clark, he cannot show that he was replaced by someone outside of his protected group—he was replaced by a black woman. Further like Clark, he asserts no evidence that the city's claimed reasons for firing him were pretextual.

Because Cooper does not tie any of the alleged racism to his termination, and because Cooper fails to rebut the city's nondiscriminatory justification for firing him, we affirm the summary judgment.

3. Green

The court granted summary judgment on Green's discriminatory demotion claim because "like Cooper, Green has not provided evidence indicating that he was replaced outside his protected group or treated less favorably than similarly situated employees outside the protected group with respect to his demotion." Instead, "[i]t is undisputed that . . . Green was replaced with a black man."

On appeal, Green makes no new evidentiary contentions, relying instead on the previously "alleged significant evidence that APD housed an environment of race-based harassment and discrimination that affected every aspect of a black officer's employment." Like Clark and Cooper, though, he makes no effort to tie that discrimination to his demotion. Like Clark and Cooper, Green also alleges that the city has presented only a pretextual justification for his demotion, but he does not even attempt to make a showing of "substantial evidence." *Jones*, 8 F.4th at 369. He relies on the same claims he made earlier, and they fail here just as they did there.

E. The *Monell* Claims

We turn to the *Monell* claims.[30] To hold a city or municipality liable for the actions of its officers, a plaintiff must demonstrate "(1) an official policy (or custom), of which (2) a policy maker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose 'moving force' is that policy (or custom)." *Newbury P. City of Windcrest*, 991 F.3d 672, 680 (5th Cir. 2021) (internal quotation marks and citation omitted).

The district court dismissed the *Monell* claims for lack of evidentiary support of specific acts of racial discrimination by the city, much less any evidence of a discriminatory policy or custom. On appeal, the plaintiffs barely brief the issue, asserting nothing new, except that they faced discrimination so widespread in "hiring, promoting, and disciplining" that it had to have been a custom. The city responds by noting that the plaintiffs make several allegations but point to effectively no evidence, and they make no legal claim. Plaintiffs do not attempt to remedy those infirmities in reply.

Without anything more to go on, we revert to the above analysis of the discrimination claims. The plaintiffs show no causation between any of the alleged racism and their negative employment outcomes, and

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[30] A *Monell* claim is a § 1983 claim against a local government for "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts [an] injury" in violation of the Constitution, as incorporated against the locality by the Fourteenth Amendment. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 695 (1978).

they fail to establish a policy or practice that unconstitutionally deprived them of their jobs. There must be some connection between those bad acts and whatever lost property interest plaintiffs are asserting. Plaintiffs have presented none.

Therefore, we affirm the summary judgment for the city on the *Monell* claims.

* * * * *

Plaintiffs have alleged numerous discriminatory actions and statements over the course of decades. But they have only alleged them. Their reliance on the complaint is insufficient to overcome the summary judgment standard. Therefore, we reject their claims of a hostile work environment, First Amendment retaliation, violation of Louisiana's whistleblower law, workplace discrimination, and *Monell* violations.

The summary judgment is AFFIRMED.

**MEMORANDUM RULING,
U.S. DISTRICT COURT,
WESTERN DISTRICT OF LOUISIANA
(SEPTEMBER 12, 2023)**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

DARRELL EUGENE CLARK, ET AL.,

v.

CITY OF ALEXANDRIA, ET AL.,

Civil Docket No. 1:20-CV-01581

Before: David C. JOSEPH, Judge, Joseph H.L. PEREZ-MONTES, Magistrate Judge.

MEMORANDUM RULING

Before the Court is a MOTION FOR SUMMARY JUDGMENT (the "Motion") filed by Defendants City of Alexandria (the "City"), Jerrod D. King ("Chief King"), Daryl Louis Terry ("Terry"), Patrick Ramon Vandyke ("Vandyke"), and Christopher Louis Cooper ("Cooper") (collectively, "Defendants"). [Doc. 100]. Defendants seek summary judgment as to every claim asserted by Plaintiffs Darrell Eugene Clark ("Clark"), Reginald David Cooper ("Cooper"), Markiz Marta Hood ("Hood"), Cedric Linbert Green ("Green"), and Tyrika Trenea Love ("Love") (collectively, "Plaintiffs").

After careful consideration, and for the reasons set forth below, the Court GRANTS Defendants' Motion.

BACKGROUND

Plaintiffs are two former employees, one current employee, and one unsuccessful applicant for employment with the Alexandria Police Department ("APD"). Their claims arise from allegedly racially discriminatory acts in connection with their employment, or desired employment, with the APD. *See* [Doc. 89, ¶ 1] (where, in their Third Amended Complaint, Plaintiffs claim that the APD has "historically and continues to engage in a department-wide pattern and practice of employment discrimination, both intentional and systemic, on the basis of race"). Chief King was the Chief of the APD during much of this time, and many of Plaintiffs' claims stem from his alleged behavior in the capacity as their supervisor. *Id.* at ¶ 14. (Chief King was "at all times [] herein the [] Chief of the APD, and . . . [therefore] the policy maker for the APD"); *see also id.* at ¶ 13 (noting that Daryl Louis Terry was the "Commissioner of Public Safety for the City and . . . [therefore] the direct supervisor of [Chief] King").

Plaintiffs filed suit in this matter on December 7, 2020, invoking this Court's federal question jurisdiction. *See* [Doc. 1, ¶ 1] (citing 28 U.S.C. §§ 1331, 1367). In their Third Amended Complaint (the "Complaint"), Plaintiffs assert the following claims:

(i) Clark, Cooper, Green, and Hood assert numerous, distinct racial discrimination claims against the Defendants pursuant to 42 U.S.C. §§ 2000e, et seq. ("Title VII"), 42 U.S.C. § 1983 ("Section 1983"), 42 U.S.C. § 1981 ("Section 1981"), the Louisiana Human

Rights Act, La. R.S. § 51:2231, (the "LHRA"), and the Louisiana Employment Discrimination Law La. R.S. § 23:332 (the "LEDL"), [Doc. 89, ¶¶ 31–80, 102–04];

(ii) Clark, Cooper, and Green assert retaliation claims against the City, Terry, and Chief King, pursuant to Section 1983 and the First and Fourteenth Amendments, *id.* at ¶¶ 81–90; and

(iii) Clark, Cooper, and Green assert eavesdropping claims under the Wiretap Act, 18 U.S.C. § 2511, *id.* at 91–95.

See generally [Doc. 89].[1]

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[1] In addition to Clark, Cooper, Green, and Hood, Plaintiffs' Complaint lists three other APD officers as parties to this lawsuit. *See* [Doc. 89, ¶¶ 8–10]. The Court has, however, already dismissed the claims of two of these Plaintiffs in a prior Order, and the merits of their allegations will not be reconsidered here. *See generally* [Doc. 88] (adopting the Magistrate Judge's Report and Recommendation, [Doc. 76], and dismissing the claims brought by Glenn Hall and Alton James Horn).

Relatedly, Plaintiffs' Opposition "concedes dismissal" with respect to both: (i) every claim asserted by Love; (ii) Hood's Title VII claims; and (iii) every claim asserted against Vandyke and Cooper individually. *See* [Doc. 107, pp. 10, 78]. Summary judgment is thus appropriate as to these claims.

Finally, Chief King and Terry have asserted qualified immunity with respect to the claims levied against them individually. *See generally* [Doc. 100-1]. Although a "good-faith assertion of qualified immunity" means the plaintiff bears the burden of establishing its inapplicability, Plaintiffs' Opposition does not address the applicability of this defense. *See generally* [Doc. 107]; *Orr v. Copeland*, 844 F.3d 484, 490 (5th Cir. 2016). Accordingly, summary judgment is appropriate as to the claims asserted against Chief King and Terry individually.

Defendants filed the instant Motion on May 25, 2023, asking the Court to "grant a summary judgment dismissal with prejudice as to all [of Plaintiffs'] claims" because those claims lack both "legal [and] evidentiary support[.]" Plaintiffs filed an Opposition on July 11, 2023, to which Defendants have filed a Reply. *See* [Docs. 107, 110]. The Motion is now ripe for ruling.

LAW AND ANALYSIS

I. Summary Judgment Standard

A court should grant a motion for summary judgment when the pleadings, including the opposing party's affidavits, "show that there is no dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). In applying this standard, the Court should construe "all facts and inferences in favor of the nonmoving party." *Deshotel v. Wal-Mart Louisiana, L.L.C.*, 850 F.3d 742, 745 (5th Cir. 2017); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."). The party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact as to issues critical to trial that would result in the movant's entitlement to judgment in its favor, including identifying the relevant portions of pleadings and discovery. *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995). If the movant fails to meet this burden, the court must deny the moving party's motion for summary judgment. *Id.*

If the movant satisfies its burden, however, the non-moving party must "designate specific facts showing that there is a genuine issue for trial." *Id.* (citing *Celotex*, 477 U.S. at 323). In evaluating motions for summary judgment, the court must view all facts in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). There is no genuine issue for trial – and a grant of summary judgment is warranted – when the record as a whole "could not lead a rational trier of fact to find for the non-moving party[.]" *Id.*

II. Race Discrimination

A. Discriminatory Termination & Demotion

Title VII, Section 1981, and the LEDL prohibit racial discrimination in the context of one's employment. *Johnson v. PRIDE Indus., Inc.*, 7 F.4th 392, 399 (5th Cir. 2021) ("We consider racial discrimination and retaliation claims based on Title VII and 42 U.S.C. § 1981 under the same rubric of analysis.") (cleaned up); *see also Bradford v. Jackson Par. Police Jury*, 2019 WL 7139499, at *4 (W.D. La. Dec. 20, 2019) ("Claims under the LEDL are 'essentially identical, analytically, to Title VII.'") (citing *Bustamento v. Tucker*, 607 So.2d 532, 538 n. 6 (La. 1992)). A plaintiff lacking direct evidence[2] of racial discrimination must satisfy the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny. *Bradford*, 2019 WL 7139499, at *4.

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[2] "Direct evidence is evidence which, if believed, proves the fact of intentional discrimination without inference or presumption." *Brown v. E. Mississippi Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993).

Under *McDonnell Douglas*, the plaintiff must first establish a *prima facie* claim of racial discrimination. *Hardison v. Skinner*, 2022 WL 2668514, at *2 (5th Cir. July 11, 2022)); *see also Whatley v. Hopewell*, 2022 WL 11385995, at * (W.D. La. Oct. 19, 2022) (noting that "[o]nce the plaintiff carries their *prima facie* burden, the employer is presumed to have retaliated against the plaintiff."). The burden then shifts to the employer to produce evidence that the complained-of conduct was the result of a "legitimate, nondiscriminatory reason." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 143 (2000) (noting that the defendant's burden "is one of production, not persuasion" and "can involve no credibility assessment.") (cleaned up). If the defendant produces evidence of a nondiscriminatory reason for the employment action, "the plaintiff then bears the ultimate burden of proving that the employer's proffered reason is not true but is instead a pretext for . . . [a discriminatory] purpose." *Hardison*, 2022 WL 2668514, at *2 ("To carry this burden, the plaintiff must rebut each nondiscriminatory or nonretaliatory reason articulated by the employer.").

The elements of a plaintiff's *prima facie* case vary with the nature of the claim asserted. *Compare Morris v. Town of Indep.*, 827 F.3d 396, 400–01 (5th Cir. 2016) (discriminatory termination) *with Alvarado v. Texas Rangers*, 492 F.3d 605, 610–11 (5th Cir. 2007) (failure-to-promote) *and McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir.2007) (Title VII retaliation). With respect to claims of discriminatory termination or failure-to promote, a plaintiff can make a *prima facie* showing of race discrimination by establishing that: (i) he is a member of a protected group; (ii) he was

qualified for the position held; (iii) he suffered some adverse employment action (*i.e.*, discharged or demoted) by their employer; and (iv) he was either replaced by someone outside his protected group or was treated less favorably than similarly situated employees outside the protected group. *Johnson v. Iberia Med. Ctr. Found.*, 2023 WL 1090167, at *9 (W.D. La. Jan. 27, 2023).

A plaintiff may carry the fourth element of their *prima facie* discrimination claim by "point[ing] to a comparator who was similarly situated" but was "treated more favorably than the plaintiff under nearly identical circumstances." *Ernst v. Methodist Hosp. Sys.*, 1 F.4th 333, 340 (5th Cir. 2021) (citing *Rogers v. Pearland Indep. Sch. Dist.*, 827 F.3d 403, 410 (5th Cir. 2016)). As between the plaintiff and the comparator, "nearly identical circumstances" exist when: (i) both employees have the same job responsibilities; (ii) both employees have "essentially comparable violation histories;" and (iii) both employees either shared the same supervisor or had their employment status determined by the same person. *Hardison v. Skinner*, 2022 WL 2668514, at *3 (5th Cir. July 11, 2022). Critically, "the plaintiff's conduct that drew the adverse employment decision must have been 'nearly identical' to that of the proffered comparator who allegedly drew dissimilar employment decisions." *Id.* (citing *Lee v. Kansas City S. Ry. Co.*, 574 F.3d 253, 259 (5th Cir. 2009)).

In this case, Clark, Cooper, and Green each broadly claim that "the APD[] has long implemented and followed a policy of discrimination in . . . disciplining police officer employees . . . on the basis of race" in violation of Title VII, Section 1981 and the LEDL.

[Doc. 107, pp. 46, 55, 75]. The claims of Clark and Cooper relate to their respective terminations in 2020, while Green's claims stem from his demotion in February 2021. The Court addresses each claim in turn.

i. Clark's Termination

Mr. Clark spent 28 years as an APD officer. [Doc. 89, p. 4]. His tenure with the APD ended on June 25, 2020, when he was discharged for "clearly r[unning] afoul of and violat[ing] well-established civil service rules and City policies[.]" *See* [Doc. 100-13, p. 8]. More specifically, Clark's termination letter states that his discharge was precipitated by Clark's misuse of APD's National Crime Information Center ("NCIC") database, Thinkstream, to run criminal background checks on other APD employees and private individuals for personal reasons.[3] *Id.* at pp. 4–8 (explaining that Clark's conduct violated La. R.S. 15:596(B), as well as numerous APD rules and regulations).

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[3] As described by another Court, NCIC is a "nationwide computerized information system maintained by the [FBI] [that] contains criminal background information on individuals residing in the United States." *See United States v. Painter*, 2013 WL 609755, at *1 (M.D. La. Nov. 20, 2013).

According to both Clark's termination letter and his own deposition testimony, Clark used Thinkstream to conduct searches on at least 15 individuals for reasons unrelated to his duties as an APD officer. *See* [Doc. 100-13, p. 4] (noting that three of those individuals were employees of the APD at the time of Clark's search); *see also* [Doc. 100-9, pp. 94, 96, 101, 110, 120] (where Clark admits to running searches on his wife, his wife's suspected lover, his former sister-in-law, his daughter, and his former girlfriend); [Doc. 100-12, pp. 30, 55] (where Clark admits to running searches on both his ex-wife and Chief King).

Here, Defendants claim that Clark is unable to meet the fourth element of his *prima facie* case, *i.e.*, that he was either replaced by someone outside his protected group or was treated less favorably than similarly situated employees outside the protected group. As noted above, a plaintiff may carry the fourth element of their *prima facie* discrimination claim by "point[ing] to a comparator who was similarly situated" but was "treated more favorably than the plaintiff under nearly identical circumstances." *Ernst v. Methodist Hosp. Sys.*, 1 F.4th 333, 340 (5th Cir. 2021). Defendants' Motion argues that because he lacks an adequate comparator, Clark cannot establish his *prima facie* case of race discrimination. [Doc. 100-1, p. 35]. Clark, in turn, offers Corporal Clifton Fairbanks ("Corporal Fairbanks"), a white APD officer, as a comparator.[4]

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[4] In addition to Corporal Fairbanks, Clark has proffered numerous other white APD officers as comparators in support of his contention that black officers "were disciplined more often or more severely for minor infractions than Caucasian officers, even when the white officers committed criminal offenses." *See* [Doc. 107, pp. 23–29] (discussing the way in which the APD disciplined several white officers who – among other things – totaled a police vehicle, falsified an incident report, made "racially charged statements", and violated departmental sick leave policy). However, with the exception of Corporal Fairbanks, these officers are not valid comparators because they have not engaged in conduct "nearly identical" to the conduct that precipitated Clark's discharge. *See Hardison v. Skinner*, 2022 WL 2668514, at *3 (5th Cir. July 11, 2022) ("[C]ritically, the plaintiff's *conduct* that drew the adverse employment decision must have been 'nearly identical' *to that of the proffered comparator* who allegedly drew dissimilar employment decisions.") (emphasis in original); *but see Lee v. Kansas City S. Ry. Co.*, 574 F.3d 253, 260 (5th Cir. 2009) ("We do not . . . interpret 'nearly identical' as synonymous with 'identical' . . . [T]he similitude of employee violations may

According to an affidavit submitted by Clark, "[Mr.] Fairbanks, a white male, was verbally reprimanded for the misuse of the NCIC Think Screen [sic] Information System for searching vehicles' license plates and the names of persons whom he believed to be associated with or dating his ex-girlfriend." [Doc. 107-2, p. 13]. But it is undisputed that (i) Corporal Fairbanks and Clark had different immediate supervisors; (ii) Clifton Fairbanks held the position of Corporal, two ranks lower than Clark, a Lieutenant; and (iii) Corporal Fairbanks worked Street Patrol while Clark commanded APD's Narcotics Division. *See* [Doc. 100-1, p. 35]; [Doc. 107, p. 29]. All told, given the drastic differences in their positional status, Clark and Corporal Fairbanks are not "similarly situated." *See Saketkoo v. Administrators of Tulane Educ. Fund*, 31 F.4th 990, 999 (5th Cir. 2022) (plaintiff's proffered comparators are inadequate in part because they held "disparate job titles and presumably different responsibilities"); *accord*, *Ernst v. Methodist Hosp. System*, 1 F.4th 333, 340 (5th Cir. 2021); *Hinga v. MIC Grp., L.L.C.*, 609 F. App'x 823, 827 (5th Cir. 2015) ("First,

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[instead] turn on the 'comparable seriousness' of the offenses for which discipline was meted out[.]").

In any event, Clark has not produced evidence that these officers shared his job responsibilities or possessed "essentially comparable violation histories." *See* [Doc. 107, pp. 22–29] (vaguely describing Clark's proffered comparators); *see also Lee*, 574 F.3d at 260 ("[N]early identical circumstances [exist] when the employees being compared held the same job or responsibilities, shared the same supervisor or had their employment status determined by the same person, *and* have essentially comparable violation histories.") (emphasis added). Accordingly, these would-be comparators do not support the fourth element of Clark's *prima facie* discrimination claim.

and most critical, [the plaintiff and their proffered comparators] did not have the same job responsibilities."). Because Clark cannot establish that he was "treated less favorably than *similarly situated* employees outside the protected group," summary judgment is appropriate as to his race discrimination claim.[5]

ii. Cooper's Termination

Prior to his termination, Cooper spent more than 30 years as an APD officer – attaining the rank of Assistant Chief. [Doc. 49-5, p. 4]. Mr. Cooper's tenure at the APD ended on July 20, 2020, when he was discharged for: (i) failing a polygraph conducted during an Internal Affairs investigation; and (ii) "conducting an unauthorized investigation into an[other] APD officer." [Doc. 100-27, p. 4] (Cooper's termination letter). Cooper's termination was later upheld by the Alexandria Municipal Fire & Police Civil Service Board on appeal. [Doc. 107, p. 30].

Mr. Cooper does not dispute the facts precipitating his discharge, but rather claims it was wrongfully motivated.[6] *See* [Doc. 107, p. 59]. But critical to his

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[5] Although a plaintiff may also establish the fourth element of their *prima facie* race discrimination claim by showing that "they were [] replaced by someone outside her protected group," *see Johnson v. Iberia Med. Ctr. Found.*, 2023 WL 1090167, at *9 (W.D. La. Jan. 27, 2023), it is undisputed that Clark's previous position no longer exists within the APD. *See* [Doc. 107, p. 51] (where Plaintiffs claim that the APD's Narcotics Division was apparently "combine[d] with the Rapides Parish Sheriff Department's Narcotics Division and other surrounding agencies, possibly creating a joint task force.").

[6] In 2019, an APD officer was accused of "us[ing] excessive force while effecting [the] arrest" of Daquarious Brown. *See Brown v. City of Alexandria*, 2022 WL 2873666, at *1 (W.D. La. July 21,

claim here, Plaintiffs' Opposition neither argues nor provides evidence that Cooper was either "replaced outside [his] protected group" or "treated less favorably than similarly situated employees outside the protected group."[7] *See* [Doc. 107, p. 55] (claiming – without

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2022) (the Section 1983 lawsuit arising from this event). According to statements he provided to the APD, Cooper believed that this APD officer had also: (i) effected a traffic stop in 1999 that resulted in an additional civil rights violation against another individual, Chris Wilder; and (ii) that the officer was also involved in an unidentified "homicide in Alexandria that was never solved." [Doc. 100-21, p. 12]; *see also* [Doc. 107, p. 59]. Apparently concerned about this officer's conduct, Cooper – unsolicited and in plainclothes – approached the house of Chris Wilder's mother in an attempt to "find out what [he] could" about the APD officer sometime prior to his discharge. [Doc. 100-25, p. 87].

After discovering Cooper's contact with Chris Wilder's mother, the APD initiated an Internal Affairs investigation that included several pre-disciplinary interviews, one of which included the use of a polygraph. *See* [Doc. 100-22]. Cooper's polygraph results indicated that he answered three separate questions untruthfully. *See generally id.* (the report written by Cecil Carter, the administrator of Cooper's polygraph); *see also* [Doc. 100-23] (the report written by Nathan Gordon, an independent polygraph examiner who corroborated the conclusions reached by Cecil Carter).

[7] It is undisputed that, after his termination, Cooper was replaced with a black woman. *See* [Doc. 100-1, p. 70]; [Doc. 107, p. 55].

Additionally, Plaintiffs' Opposition makes a passing reference to Sergeant Mark Tigner, a white APD officer who allegedly "ma[de] false statements to the Louisiana State Police in reference to submitting . . . false [NCIC] recertification test scores of APD officers for several years." [Doc. 107, p. 29]. Aside from being different ranks – Cooper was then the Assistant Chief – there is no indication that Sergeant Tigner "released [] APD information to persons not employed with the APD" or "conduct[ed] an unauthorized investigation into an[other] APD officer." For these

explanation – that "Mr. Cooper's Affidavit testimony shows that he was, in fact, the subject of discrimination" as a part of his termination); *see also* [Doc. 49-5] (Cooper's affidavit, which does not identify an adequate comparator or otherwise suggest that his termination was racially motivated); *Brew v. Weyerhaeuser NR Co.*, 537 Fed. App'x 309, 313 (5th Cir. 2013) (dismissal proper where the plaintiff "does not allege, much less show [] that any of [his proffered comparators] was similarly situated."). Because Cooper cannot establish the fourth element of his *prima facie* case, summary judgment is appropriate as to his claim of racially discriminatory termination.

iii. Green's Demotion

Finally, much like Cooper, Green was employed for more than 30 years with the APD. [Doc. 107-5, pp. 1, 14]. Although Green is still an APD officer, on February 26, 2021, he was demoted from the position of Lieutenant to Sergeant. [Doc. 100-1, p. 84]; *see also* [Doc. 107, pp. 30–31] (where Plaintiffs note that "[u]pon appeal to the Alexandria Municipal Fire & Police Civil Service Board, his demotion was upheld."). Mr. Green's disciplinary letter explains that he was demoted for two reasons:

(i) As noted above, Cooper unsuccessfully appealed his termination to the Alexandria Municipal Fire and Police Civil Service Board. [Doc. 107, p. 30]. Sometime in late 2020, without authorization from the APD, Green provided an "employment list" to Cooper

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reasons, Sergeant Tigner is an inadequate comparator for purposes of Cooper's *prima facie* claim.

for use in his Civil Service appeal. [Doc. 100-32, p. 1]. This document – which contained the home address and phone number of every officer then-employed by the APD – was later used by Plaintiffs' counsel in connection with Cooper's appeal. *Id.*

(ii) When he was later questioned during an Internal Affairs investigation, Green stated repeatedly that he did not know how Plaintiffs' counsel gained possession of this document. *See* [Doc. 100-32, pp. 15–22] (where Green insists he has "no idea" how the employment list became a part of Cooper's Civil Service appeal). During a subsequent interview – which apparently included the use of a polygraph – Green repudiated his prior statements and admitted that he did in fact provide the employment list to Cooper. [Doc. 100-37, pp. 12–15, 23].

Plaintiffs' Opposition indicates that the facts giving rise to Green's demotion are undisputed. *See* [Doc. 107, pp. 66–70]. Nevertheless, Plaintiffs maintain that "[d]isputes in material fact concerning whether [Mr. Green] was demoted due to discriminatory reasons prelude summary judgment with respect to this claim." *Id.* However, much like Cooper, Green has not provided evidence indicating that he was "replaced outside [his] protected group" or was "treated less favorably than similarly situated employees outside the protected group" with respect to his demotion.[8] *See generally id.* Accordingly, because Green cannot establish the fourth

[8] It is undisputed that, following his demotion, Green was replaced with a black man. *See* [Doc. 100-1, p. 88]; [Doc. 107, p. 67].

element of his *prima facie* case, summary judgment is appropriate as to his racially discriminatory demotion claim.

B. Hood's Failure-to-Hire Claim

One plaintiff, Hood, claims that he was the subject of racial discrimination in APD's refusal to hire him as an officer. A plaintiff asserting a failure-to-hire claim must establish that: (i) he is a member of a protected class; (ii) he applied and was qualified for an open position; (iii) despite his qualifications, he was not selected for the position; and (iv) after his rejection, the position stayed open, and the employer continued to seek applicants with the plaintiff's qualifications. *Johnson v. Maestri-Murrell Prop. Mgmt.*, LLC, 487 F. App'x 134, 138 (5th Cir. 2012). The burden then shifts to the defendant to "produce evidence that [their] . . . [hiring] decision was made for a 'legitimate, non-discriminatory reason.' " *Id.* Finally, the plaintiff must prove "intentional discrimination [using] evidence that the [] reason offered by the defendant was not the true reason but was [rather] a pretext for discrimination." *Id.* (citing *Reeves v. Sanderson Plumbing Prods.*, Inc. 530 U.S. 133, 142–43 (2000)).

According to his affidavit, despite passing the Civil Service Examination, Hood unsuccessfully applied for a position with the APD three times. [Doc. 107-6, p. 2]. Mr. Hood claims that, following his most recent application in 2018, he was "orally advised [] that [he] was cleared to work for the APD" by the clinical psychologist who administered his mental health evaluation." *Id.* However, when the APD contacted Hood on January 2, 2019, he was informed that he had in fact failed the

APD's mental health evaluation and would therefore not be hired. *Id.*; [Doc. 100-1, p. 103]; [Doc. 107, p. 79].

Despite submitting his application in 2018, Hood did not seek to be added as a plaintiff in this lawsuit until July 7, 2021. *Compare* [Doc. 1] *with* [Doc. 11]. Both LEDL claims and failure-to-hire claims arising under Section 1981[9] are subject to a one-year prescriptive period and, as noted above, Hood "concedes that summary judgment is appropriate with respect to his Title VII claim." *See* [Doc. 107, p. 78]; *Mitchell v. Crescent River Port Pilots Ass'n*, 265 F. App'x 363, 368 (5th Cir.

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9 Section 1981 does not contain a statute of limitations. *See generally* 42 U.S.C. § 1981. When a federal cause of action lacks a statute of limitations, courts typically apply "the most appropriate or analogous state statute of limitations" which, here, would be Louisiana's one-year prescriptive period. *See Belton v. Geo Grp., Inc.,* 2021 WL 926197, at *3 (W.D. La. Mar. 10, 2021)*, aff'd*, 21-30144, 2021 WL 5832953 (5th Cir. Dec. 8, 2021) (citing *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 371 (2004) and La. C.C. art. 3492). When, however, a cause of action "aris[es] under federal statutes [that were] enacted after December 1, 1990, courts must apply [the] catchall four-year statute of limitations" provided in 28 U.S.C. § 1658. *Belton*, 2021 WL 926197, at *3.

As this Court has previously explained, "Section 1981 was originally enacted as part of the Civil Rights Act of 1866 and [in its original form] covered 'only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process.'" *Id.* at *4 (citing *Culbert v. Cleco Corp.*, 926 F.Supp.2d 886, 891 (W.D. La. 2013) and noting that "Section 1981 was later amended by the Civil Rights Act of 1991 to create a cause of action for discriminatory and retaliatory conduct occurring after the formation of the contract."). Here, because Hood's failure-to-hire claim relates to "conduct at the initial formation of [his employment] contract" rather than "conduct occurring after the formation of [his employment] contract," Hood's claim is governed by the one-year prescriptive period imposed by La. C.C. art. 3492.

2008) (with respect to discrete claims of discrimination under Section 1981, federal courts must "borrow the analogous state tort statute of limitations, which [here] is Louisiana's one-year prescriptive period."); La. R.S. § 23:303 ("Any cause of action provided in this Chapter shall be subject to a prescriptive period of one year."). Mr. Hood's failure-to-hire claim is thus time-barred under both Louisiana and federal law, and summary judgment is therefore appropriate with respect to that cause of action.[10]

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[10] Although he was never hired by the APD, Plaintiffs' Opposition indicates that Hood is "currently employed full-time as a Lake Charles Police Department Patrol Officer [as of] August 1, 2022." [Doc. 107, pp. 78–80]. Hood insists that the prescriptive period for his LEDL and Section 1981 claims did not begin to run until "he underwent, and passed, the [] psychological evaluation administered . . . in July 2022, when he applied for employment at the Lake Charles Police Department." This position is both legally and factually meritless.

First, Hood cites no authority in support of his argument that prescription commenced when he was later hired by Lake Charles. Nor is the law unclear on this point. *See id.*; *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110–11 (2002) (explaining in the Title VII context that a "discrete . . . discriminatory act" – such as a refusal to hire an individual of their race – "occurred on t*he day that it happened*.") (internal quotations omitted) (emphasis added); *see also Mitchell v. Crescent River Port Pilots Ass'n*, 515 F. Supp. 2d 666, 676 (E.D. La.2007), *aff'd*, 265 F. App'x 363 (5th Cir.2008) (noting that both the Fifth Circuit and other circuit courts have invariably applied the Supreme Court's decision in *Morgan* to claims arising under Section 1981); *Clark v. City of Alexandria*, 2022 WL 18144872, at *4 (W.D. La. Dec. 9, 2022), *report and recommendation adopted*, 2023 WL 122971 (W.D. La. Jan. 6, 2023) ("The prescriptive period for discrete acts begins to run on the day the act occurred . . . [and] [b]ecause Hall's . . . claims relating to his termination were filed more than one year after his termination, they are untimely."); *Mayes v. Office Depot, Inc.*, 292 F. Supp. 2d 878, 888 (W.D.

C. Hostile Work Environment

Title VII, Section 1981, and the LEDL prohibit the creation of a hostile or abusive work environment. *Lauderdale v. Texas Dep't of Crim. Just., Institutional Div.*, 512 F.3d 157, 162 (5th Cir. 2007) (citing 42 U.S.C. § 2000e–2(a)(1)); *Williams v. E.I. du Pont de Nemours & Co.*, 154 F. Supp. 3d 407, 420 (M.D. La. 2015) ("Courts analyze employment discrimination claims brought under Section 1981, including hostile work environment and retaliation claims, under the same standards applicable to Title VII claims.") (internal quotations omitted); *Robinson v. Healthworks Int'l, L.L.C.*, 36,802, p. 6 (La. App. 2 Cir. 1/29/03); 837 So.2d 714, 719, w*rit not considered sub nom. Robinson v.*

La.2003) ("A one-time employment event, *including the failure to hire*, is 'the sort of discrete and salient event that should put the employee on notice that a cause of action has accrued.'") (emphasis added).

Further, even assuming his claim was timely, the only evidence of Hood's mental fitness is the mental health evaluation he completed as part of his 2018 application. *See* [Doc. 98].

Plaintiffs' Opposition does not produce any evidence that this evaluation was administered incorrectly or in a discriminatory manner. *See* [Doc. 107, pp. 80–81]. Moreover – and notwithstanding Hood's arguments to the contrary – the fact that Hood subsequently passed the Lake Charles Police Department's mental health evaluation in 2022 has limited relevance to his mental fitness *in 2018*, the year in which he applied for a position with the APD. *See id.* (concluding that "Mr. Hood's Affidavit testimony shows that he was, in fact, qualified as evidenced by his other employment opportunities."). Because there is nothing in the record indicating that Hood was mentally fit at the time of his 2018 application, Hood cannot show that he was qualified for a position as an APD officer, which necessarily means he cannot establish an essential element of his *prima facie* failure-to-hire claim.

Health Works Int'l, L.L.C., 2003-0965 (La. 5/16/03); 843 So.2d 1120 (discussing the LEDL); *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 106 (2002) ("A hostile work environment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice.'").

To survive summary judgment on a hostile work environment claim, an employee must establish that: (i) the employee belongs to a protected class; (ii) the employee suffered harassment affecting a "term, condition, or privilege" of their employment; (iii) the harassment was unwelcome; and (iv) the harassment was based on the employee's status as a member of a protected class. *Wantou v. Wal-Mart Stores Texas, L.L.C.*, 23 F.4th 422, 433 (5th Cir. 2022). Critically, for harassment to affect a "term, condition, or privilege" of employment, the conduct at issue must be "sufficiently *severe or pervasive* to alter the conditions of the victim's employment and create an abusive working environment."[11] *Wantou*, 23 F.4th at 433 (emphasis added).

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11 In determining the "severity or pervasiveness" of sexual harassment, courts typically consider: (i) the frequency of the conduct; (ii) the conduct's severity; (iii) whether the conduct is physically threatening or humiliating; and (iv) whether the conduct "unreasonably interferes with an employee's work performance." *Wantou*, 23 F.4th at 433 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998)). This is a totality of the circumstances inquiry; no single factor is dispositive. *Id.*

Additionally, harassment must be either severe or pervasive; it need not be both. *See Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 436 (5th Cir. 2005) ("[I]solated incidents, if egregious, can alter the terms and conditions of employment."); *see also Herster v. Bd. of Supervisors of Louisiana State Univ.*, 72 F. Supp. 3d 627, 644–45 (M.D. La. 2014) (allegations of small but frequent derogatory comments sufficient to survive summary

i. Clark's Claims

Clark alleges that on several occasions, Chief King "embarrassed and intimidated Mr. Clark" by engaging in conduct that "[was] sufficiently severe or pervasive to alter the conditions of Mr. Clark's employment." [Doc. 107, p. 45]. Mr. Clark describes these incidents as follows:

(i) On an unspecified date, a white APD officer allegedly "call[ed] [a black APD officer] 'Monkey Boy' while on duty in a public venue." [Doc. 107-2, p. 3] (Clark's affidavit).

(ii) On an unspecified date, a white APD officer allegedly "made statements that could be considered racially offensive" while speaking with a black APD officer. *Id.* at p. 9.

(iii) On an unspecified date, after Mr. Clark "questioned how Chief King [] screen[ed] an African American Applicant", Chief King allegedly responded by saying that "his entire staff would soon be all African American" and described his senior staff as "the colored coalition." [Doc. 107, p. 42].

(iv) In February of 2019, Chief King allegedly "made intimidating and angry faces at Mr. Clark" on two separate occasions as Mr. Clark spoke with Mr. Cooper. *Id.* During one of these incidents, Chief King apparently "asked Mr. Clark if [Mr. Clark] was talking

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judgment). Consequently, "the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct." *Wantou*, 23 F.4th at 432.

about Chief King[] as a method of intimidation." *Id.* at pp. 42–43.

(v) On one occasion in March of 2019, Chief King allegedly "hurried over and stood in the middle of [a group of black officers, including Mr. Clark] without speaking to them" while "look[ing] at each person with an angry look." *Id.* at p. 43. Mr. Clark describes this as "another incident of Chief King trying to intimidate Mr. Clark." *Id.*

(vi) In June of 2019, Chief King purportedly "yelled at Mr. Clark in a hostile and demeaning tone", conduct that Mr. Clark describes as "unprofessional" given that "other officers observed the incident." *Id.*

(vii) That same month, Chief King allegedly "confronted Mr. Clark in a hostile manner" about a prior conversation Mr. Clark had with other APD officers. *Id.* at pp. 43–44.

(viii) In October of 2019, Chief King's "tone became loud and demeaning towards Mr. Clark" after the two had a work disagreement regarding the APD's narcotics division. *Id.* at p. 44.

(ix) Finally, during a departmental meeting in October 2019, Mr. Clark was allegedly "verbally attacked" by Mr. Vandyke and another APD officer. *Id.* Mr. Clark claims that "Chief King did nothing to reprimand those officers and [] also spoke to Mr. Clark in a demeaning tone." *Id.*

Mr. Clark's allegations are insufficient to comprise a hostile work environment claim as a matter of law. This is true for three reasons. First, most of Clark's allegations do not bear any relationship to race, and there is otherwise no evidence indicating that the complained-of conduct was racially motivated. *See Brew v. Weyerhaeuser NR Co.*, 537 F. App'x 309, 313 n.9 (5th Cir.2013) ("We do not consider other incidents of alleged harassment not based on race . . . because [plaintiff] has no evidence 'that the non-race-based harassment was part of a pattern of race-based harassment.'"); *Rome-Bienemy v. Children's Hosp.*, 2015 WL 8600689, at *8 (E.D. La. Dec. 14, 2015) ("Title VII does not provide a cause of action for work environments that are simply 'hostile.'") (citing *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 654 (5th Cir.2012)); *Russell v. Louisiana through Div. of Admin.*, 2006 WL 8432078, at *8 (M.D. La. Oct. 3, 2006) (granting summary judgment where "none of the defendants made derogatory statements to [plaintiff] regarding her race"). Because conduct "with no clear connection to race . . . [is] not probative of a *race-based* hostile work environment," most of Clark's allegations do not support his hostile work environment claim. *Rome-Bienemy*, 2015 WL 8600689, at *8 (emphasis in original).

Second, two of the incidents described by Clark involve alleged harassment directed at someone other than himself. Although "a plaintiff for some purposes . . . [may] introduce evidence of discrimination of others" to support their hostile work environment claim, offensive comments that do not target the plaintiff are given limited weight. *See Septimus v. Univ. of Houston*, 399 F.3d 601, 612 (5th Cir. 2005) (dismissal appropriate in part because the plaintiff"

did not personally experience most (if not all) of the conduct complained of by the other women."); *Collier v. Dallas Cnty. Hosp. Dist.*, 827 F. App'x 373, 378 (5th Cir. 2020) (summary judgment proper in part because inappropriate comments were not directed at the plaintiff); *White v. Gov't Emps. Ins. Co.*, 457 F. App'x 374, 381 (5th Cir. 2012) (dismissal proper in part because "[n]one of [the plaintiff's allegations] involved physically threatening or humiliating conduct . . . [and] the [most offensive] comment was not directed at [plaintiff]"); *Edwards v. Louisiana Cmty. & Tech. Coll. Sys.*, 2012 WL 1391662, at *2 (W.D. La. Apr. 20, 2012) (dismissal proper where most of the complained-of statements "were [not] directed at Plaintiff."); *Williams v. KTVE/KARD TV Station*, 2013 WL 1908298, at *4 (W.D. La. May 7, 2013) (summary judgment proper where the alleged "remarks and/or incidents were not directed toward plaintiff."); *but see Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 653 (5th Cir. 2012) (noting that "[w]e have held in the context of sex discrimination that harassment of women other than the plaintiff [can be] relevant to a hostile work environment claim.").

Third, the one alleged comment by Chief King that does relate to race and was directed, at least in part, at Clark is insufficient standing along to survive summary judgment. To be clear, this allegation – that Chief King described his leadership team as "the colored coalition" – both relates to race and is objectively and subjectively offensive. But considering jurisprudence from the Fifth Circuit and other courts, it is simply not "severe" enough as a matter of law to have altered the conditions of Clark's employment. *Cf. White v. Gov't Employees Ins. Co.*, 457 F. App'x 374,

381 n.35 (5th Cir.2012) (describing the "kinds of verbal harassment that [the Fifth Circuit] and other circuits have held would support a [] hostile work environment claim."); *see also Molden v. E. Baton Rouge Par. Sch. Bd.*, 715 F. App'x 310, 316 (5th Cir. 2017) ("The legal standard for workplace harassment in this circuit is . . . high."); *Wantou v. Wal-Mart Stores Texas, L.L.C.*, 23 F.4th 422, 433 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 745, *reh'g denied sub nom. Wantou v. Wal-Mart Stores Texas, L.L.C*, 143 S. Ct. 1049 (2023) (noting that "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."). Accordingly, because Clark has insufficient evidence of *severe or pervasive* conduct altering the conditions of his employment and thereby creating abusive working environment, summary judgment is appropriate as to his hostile work environment claim.

ii. Cooper's Claims

Next, Cooper claims that the APD "has been a hostile work environment due to the racial prejudice . . . that was manifested in its majority [] Caucasian uniform officers, including [Chief King], since [1977]." [Doc. 49-5, p. 1] (Cooper's affidavit). In support of this contention, Cooper alleges the following:

(i) Mr. Cooper claims that "Caucasian officers" were frequently given overtime positions. *Id.* at p. 2. In contrast, Cooper was apparently forced to "file a grievance to work the Rapides Parish Fair for overtime with the City of Alexandria" sometime in 1990. *Id.*

(ii) In 2013 or 2014, a white APD officer allegedly referred to Cooper as a "nappy head." *Id.*

(iii) On an unspecified date, Cooper's supervisor allegedly told him that "you people do not get sick," apparently referencing to black APD officers. *Id.*

(iv) In 2014 or 2015, in front of Cooper and several other white officers, a white APD officer allegedly told a white captain to "show [him the] 'silver dollar you have in your pocket.' " *Id.*[12] All the white officers then laughed. *Id.* According to Cooper, another white officer then referenced a "television special [regarding] the KKK" while another exclaimed, "look out [n-word], the Klan is getting bigger." *Id.*

(v) In 2020, Cooper became "the first African American Assistant Chief in the history of the Alexandria Police Department." *Id.* at p. 4. According to Cooper, despite his rank, he was "tak[en] out of the chain of Command by Chief King," who would "frequently allow subordinates to come directly to him and bypass [Cooper]." *Id.*

(vi) In February or March of 2020, Cooper purportedly "advised Chief King that [the APD] needed to hire more minorities[.]" Chief King allegedly replied by stating that "we do not have to hire minorities," explaining

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12 According to Cooper's affidavit, "a silver dollar in a Caucasian's pocket . . . show[s] that he would be [involved with] the inner works of the Ku Klux Klan[.]" [Doc. 49-5, p. 2].

> that he was "not going to lower the [APD's] standard to hire minorities." *Id.*

Mr. Cooper's allegations are likewise insufficient to establish the existence of a hostile work environment. First, as with Clark's claim, several of Cooper's allegations are thoroughly unrelated to race and therefore "do not sustain a race-based hostile work environment claim." *See Baker v. FedEx Ground Package Sys. Inc.*, 278 F. App'x 322, 329 (5th Cir. 2008); *see also supra*; *Brown v. Beverly Indus., LLC*, 2015 WL 1125270, at *5 (E.D. La. Mar. 12, 2015) (harassment "not based on race . . . cannot sustain a race-based hostile work environment claim."). Additionally, two of Cooper's other allegations – specifically the "nappy head" and "you people do not get sick" comments – though racially offensive, are insufficient, in and of themselves, to "affect[]a "term, condition, or privilege" of his employment. *See, e.g., Cavalier v. Clearlake Rehab. Hosp., Inc.*, 306 F. App'x 104, 107 (5th Cir. 2009) (defendant's three comments – one where defendant told plaintiff he would "beat the tar off of him" and two involving the use of the word "boy" – did not "rise to the level of severity or pervasiveness required to show a hostile work environment"); *Baker*, 278 F. App'x at 329 ("[Defendant's] other comments – that 'she did not want to work with people like' [plaintiff] and that 'whites rule' – are race-related incidents, but they are not sufficiently severe and did not unreasonably interfere with [plaintiff's] work performance.").

Finally, Cooper's allegation regarding the 2014 or 2015 incident of another APD officer overtly referencing the Ku Klux Klan and using the "n-word" while in his presence is both humiliating, highly offensive, and, if true, undoubtedly warranted discipline. However, an

incident of this severity is alleged to have occurred only once over the course of Cooper's 30-year-long career with the APD and was not directed at him. Further, Cooper was subsequently promoted to Assistant Chief of the APD, and he has otherwise produced no evidence indicating this event affected any term of his employment. *Compare Higgins v. Lufkin Indus., Inc.*, 633 F. App'x 229, 230, 235 (5th Cir. 2015) (two instances of inappropriate comments in one year – one of which included the phrase "n-word bitch" – insufficiently "severe or pervasive" to create a hostile work environment) *with Walker v. Thompson*, 214 F.3d 615, 619–22 (5th Cir. 2000) (summary judgment improper where offensive remarks were allegedly constant over the course of three years and included "comparisons to slaves and monkeys, derisive remarks regarding [plaintiffs'] African heritage, patently offensive remarks regarding the hair of African–Americans, and conversations in which a co-worker and supervisor used the [n-word]."); *see also Buisson v. Bd. of Sup'rs of Louisiana Cmty. & Tech. Coll. Sys.*, 592 F. App'x 237, 245 (5th Cir. 2014) (collecting cases and explaining that "[defendant's] use of the bigoted term 'chink' was isolated . . . [and] its one-time utterance is insufficient . . . to create a race- or national-origin-based, hostile work environment."); *Johnson v. TCB Const. Co.*, 334 F. App'x 666, 671 (5th Cir. 2009) ("[A]lthough [defendant's] alleged comment to [plaintiff] that he was just 'like a damn [n-word]' . . . is repulsive, it is isolated and [plaintiff] has offered no evidence concerning its objective effect on his 'work performance.' "); *Culbert v. Cleco Corp.*, 926 F. Supp. 2d 886, 898 (W.D. La.), *aff'd*, 538 F. App'x 504 (5th Cir. 2013) (summary judgment proper where "[plaintiffs] claim is based upon sporadic conduct and isolated incidents that occurred

over the course of his entire employment which spanned over twenty-five years."). All told, because Cooper has insufficient evidence of severe or pervasive conduct altering the conditions of his employment and thereby creating abusive working environment, summary judgment is appropriate with respect to his hostile work environment claim.

iii. Green's Claims

Finally, Green claims that "[r]acial prejudice was manifested within the [APD]" throughout the course of his career. [Doc. 107-5, p. 1]. In support of his hostile work environment claim, Green makes the following allegations:

(i) Sometime in the mid-nineties, Green claims that "approximately eleven black officers left the [APD] due to [unspecified] racial prejudice and oppression that permeated the APD and were implemented or acquiesced in by the APD administration." *Id.* at p. 2.

(ii) On unspecified dates, Green recalls black APD officers being referred to as "Lower Third Coon[s]," apparently in reference to "an area of Alexandria populated by African American citizens." *Id.*

(iii) On an unspecified date, a black APD officer was a called a "Chocolate Bunny" by a senior white officer. *Id.*

(iv) On an unspecified date, a black APD officer found watermelon left in his vehicle. *Id.* A white APD officer later "brought a box of chicken . . . and placed it in front of [the

black APD officer] and stated, 'I heard you people like chicken and watermelon.' " *Id.*

(v) Sometime in 2013, following Green's promotion to Deputy Chief, an unknown person left a message on the blackboard in a common area that read, "A new SUV, a new Chief, and his trunk monkey." *Id.* at p. 3.

As with Clark and Cooper, Green's allegations are insufficient under Fifth Circuit precedent to support a hostile work environment claim. Despite being offensive and warranting discipline, four of Green's five allegations relate to the harassment of someone other than Green and – as discussed above – these incidents are of limited evidentiary value. *See supra.* Additionally, as with Cooper, Green does not allege harassment that is "severe or pervasive" enough to "affect a "term, condition, or privilege" of his employment, particularly when considered against the backdrop of Green's roughly 30-year-long tenure with the APD and eventual promotion to Deputy Chief. Summary judgment is therefore proper with respect to Green's hostile work environment claim.

III. *Monell* Claims

Next, a local government entity may be liable under Section 1983 if either: (i) that entity "cause[s] a constitutional tort through a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers;" or (ii) a "constitutional deprivation [occurs] pursuant to a governmental custom, even if such custom has not received formal approval." *Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 166 (5th Cir. 2010) (describing the cause of action promulgated by *Monell v. New York*

City Dep't of Soc. Servs., 436 U.S. 658 (1978)) (internal citations omitted). A *Monell* claim is thus comprised of three elements: (i) a policymaker; (ii) an "official policy" or "governmental custom;" and (iii) a "violation of constitutional rights whose moving force is the policy or custom." *Id.* (noting that "[t]he elements of the *Monell* test exist to prevent a collapse of the municipal liability inquiry into a respondeat superior analysis.").

Here, Plaintiffs claim that the City and the APD – primarily through Chief King and Terry – has "implemented, acquiesced in, and followed a [custom] of discrimination in hiring, promoting, and disciplining police officer employees on the basis of race[.]" [Doc. 89, p. 37]. But their assertion lacks evidentiary support.

Critically, a *Monell* claim requires the plaintiff to link a "constitutional violation" to a "policy or custom" maintained by a municipality. *Bennett v. Serpas*, 2017 WL 2778109, at *2 (E.D. La. June 26, 2017) (citing *Pineda v. City of Houst*on, 291 F.3d 325, 328 (5th Cir. 2002)); *see also Brown v. Bryan Cty.*, 219 F.3d 450, 457 (5th Cir. 2000) (a *Monell* plaintiff claiming the existence of an unconstitutional "custom" must establish "[a] *persistent, widespread* practice of city officials [that] . . . is *so common and well settled* as to constitute a custom that fairly represents municipal liability.") (emphasis added); *see also Davidson v. City of Stafford, Texas*, 848 F.3d 384. 396 (5th Cir. 2017), *as revised* (Mar. 31, 2017) ("A pattern requires similarity, specificity, and *sufficiently numerous prior incidents*.") (emphasis added). As this Court has already explained, Plaintiffs have not sufficiently shown specific acts of racial discrimination on the part of the City, let alone

a "widespread practice" sufficient to satisfy the standards imposed by *Monell* and its progeny.[13] *See generally supra* (dismissing Plaintiffs' race discrimination claims). Because Plaintiffs have failed to provide evidence supporting their claim, summary judgment is appropriate as to their *Monell* claim.[14]

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[13] Throughout the course of this litigation, Plaintiffs have claimed entitlement to *Monell* liability because, from 1978 to 2019, the City was one of several Louisiana municipalities subject to a Consent Decree issued and overseen by the Eastern District of Louisiana. *See USA v. City of Alexandria*. No. 2:77-cv-02040-LMA (June 6, 1977); [Doc. 107, p. 16]; [Doc. 89, ¶ 34].

Contrary to Plaintiffs' argument, however, "the fact that the City entered into a Consent Decree [actually] suggests that the City recognized that a problem existed and agreed to remedy it." *See Gomez v. Galman*, 18 F.4th 769, 779 (5th Cir. 2021) (considering and rejecting an identical argument).; *see also USA v. City of Alexandria*. No. 2:77-cv-02040-LMA (June 6, 1977), [Doc. 213] (where the presiding court found that "[the City] utilizes lawful selection processes for the hiring and promotion of police officers and firefighters" and that "with the City's adoption of lawful police officer and firefighter selection processes, the representation of African Americans and women among its police officer and firefighter workforces has improved significantly with respect to the relevant labor pools."). The prior existence of this Consent Decree, then, does not support a finding of *Monell* liability.

[14] As an aside, Plaintiffs' Complaint claims that Terry, [Chief] King, and Vandyke . . . have acted with malice or reckless indifference to the rights of the above-named African American plaintiffs, thereby entitling these plaintiffs to an award of punitive damages" under 18 U.S.C. § 1981a. [Doc. 89, ¶ 71]. The cited statute, however, requires that Plaintiffs "demonstrate[] that the [defendant] engaged in a discriminatory practice" made unlawful by Section 1981. 18 U.S.C. § 1981a(b)(1). Because Plaintiffs have not made this required showing, punitive damages are unavailable in this case.

IV. First Amendment Retaliation

In addition to their claims of race discrimination, Clark, Cooper, and Green claim that they have "been retaliated against due to their disclosing to their attorney [and the FBI] . . . a civil rights violation" in violation of Section 1983, the First Amendment, and La. R.S. 23:967.[15] [Doc. 89, ¶¶ 1, 81–90]. Plaintiffs' Complaint describes the facts supporting this claim as follows:

> The City's retaliation against Plaintiffs Clark, Cooper, and Green was due to their disclosing to an agent of the Federal Bureau of Investigation ("FBI") a civil rights violation ("excessive force") involving a firearm committed by a senior Caucasian APD officer . . . upon an African American suspect [in 2019], which aggravated assault was recorded by [the white APD officer's] body camera . . .
>
> Legal counsel with whom the senior officers consulted [later] recommended and facilitated a Zoom audio/video conference with an agent of the FBI. During that conference, Plaintiff [sic] and the aforesaid senior officers reported the [alleged] civil rights violations of [the

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[15] Clark, Cooper, and Green also claim that the APD "fail[ed] . . . to comply with the procedural provisions of [La.] R.S. 40:2531 [which] amounted to a denial of due process granted to Plaintiffs by the provisions of the Fourteenth Amendment to the U.S. Constitution." [Doc. 89, p. 34]. Plaintiffs do not, however, explain the factual basis for this contention. *See id.*; *see also* [Doc. 104, pp. 62, 74] (making an identical statement without providing any factual predicate that would support such an allegation). Accordingly, insofar as Clark, Cooper, and Green have alleged a violation of La. R.S. 40:2531, those claims are dismissed.

> white officer] and the acquiescence therein by [Chief] King, [Mr.] Terry, and the City.[16]

Id. at ¶¶ 5–7, 19, 21, 24. Following these events, Plaintiffs claim that Clark, Cooper, and Green were retaliated against in two respects. First, all three plaintiffs claim they were subjected to several "illegal investigation[s]" following their collective contact with their attorney and the FBI. [Doc. 107, p. 38]; *see also* [Doc. 107-5, p. 11] (where, in his affidavit, Green claims that he "was under investigation for no reason other than to discriminate against [him], to retaliate against [him], and to harass [him] for reporting a civil rights violation."). Mr. Clark and Cooper likewise characterize their respective discharges as retaliatory

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[16] Relatedly, Clark, Cooper, and Green have also asserted a claim under Louisiana's Whistleblower Statute arising from their disclosure of this same alleged "civil rights violation." *See* La. R.S. 23:967(A) ("An employer shall not take reprisal against an employee who . . . [d]iscloses or threatens to disclose a workplace act or practice that is in violation of state law."); *see also Brown v. City of Alexandria*, 2022 WL 2873666 (W.D. La. July 21, 2022) (the lawsuit arising from the alleged civil rights violation referenced by Plaintiffs' Complaint and in which this Court found that material issues of fact precluded summary judgment).

Here, assuming a state law violation occurred in the incident discussed in *Brown*, Clark, Cooper, and Green have failed to adduce any facts linking their alleged discussions with their attorney and the FBI to their discharges and demotions. *See Hale v. Touro Infirmary*, 2004-0003, p. 10 (La. App. 4 Cir. 11/3/04), 886 So. 2d 1210, 1216, *writ denied*, 2005-0103 (La. 3/24/05), 896 So. 2d 1036 (a viable Whistleblower requires that plaintiff prove an adverse employment action was "the result of [their] . . . threat to disclose the [unlawful] practice."). Summary judgment is appropriate as to Clark, Cooper, and Green's Louisiana Whistleblower claim.

acts arising from the same events that precipitated these allegedly "illegal investigation[s]," and Green makes a similar characterization with respect to his demotion. *See* [Doc. 89, ¶¶ 19–21].

The First Amendment "prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech. *Nieves v. Bartlett*, 139 S.Ct. 1715, 1722 (2019) (internal quotations omitted). In the Fifth Circuit, a plaintiff asserting a First Amendment retaliation claim must show that: (i) the plaintiff suffered an adverse employment decision; (ii) the plaintiff engaged in speech involving "a matter of public concern;" (iii) the plaintiff's interest in speaking outweigh the defendant's interest in promoting efficiency; and (iv) the protected speech motivated the defendant's conduct, *i.e.*, that there is "a causal connection between the government's retaliatory animus and his subsequent injury." *Lewis v. Panola Cnty., Mississippi*, 2022 WL 17496048, at *2 (5th Cir. Dec. 8, 2022); *Lehman v. Guinn*, 2021 WL 935887, at *9 (W.D. La. Feb. 9, 2021), *report and recommendation adopted*, 2021 WL 929885 (W.D. La. Mar. 10, 2021).

The Court addresses only the fourth element – assuming without deciding that the first three elements have been met. A First Amendment retaliation claim requires the plaintiff to demonstrate that their speech was the "but-for cause" of a given adverse employment action. *Nieves*, 139 S.Ct. at 1722 (noting the plaintiff must show that "the adverse action against the plaintiff *would not have been taken* absent the retaliatory motive.") (emphasis added). To establish this element of their *prima facie* case, a plaintiff must "present either direct evidence of retaliation or circumstantial

evidence [which creates] a rebuttable presumption of retaliation." *Lewis*, 2022 WL 17496048, at *2 (cleaned up).

Here, Clark, Cooper, and Green have not established a viable retaliation claim. This is true for three reasons. First, the record is simply devoid of any "direct evidence" indicating that the APD's conduct was motivated by Plaintiffs' contact with their attorney or with the FBI. *See generally* [Docs. 89, 107].

Second, although "close timing between an employee's [speech] and an adverse employment action can be a sufficient basis for a court to find a causal connection," neither Clark, Cooper, nor Green have identified any evidence as to *when* they allegedly reported this conduct to their attorney and the FBI or *when* the APD learned of this alleged contact.[17] *See generally* [Doc. 107] (Plaintiffs' Opposition); [Doc. 89] (Plaintiffs' Complaint); [Doc. 49-5] (Cooper's affidavit); [Doc. 107-2] (Clark's affidavit); [Doc. 107-5] (Green's affidavit); *see also RSR Corp. v. Intl. Ins. Co.*, 612 F.3d 851, 857 (5th Cir. 2010) ("The court has no duty to search the record for material fact issues. Rather, the party opposing [] summary judgment is required to identify

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[17] As in the employment discrimination context, a plaintiff may demonstrate the fourth element of their *prima facie* retaliation claim by showing that they were "treated different from other [employees] with similar records." *United Steel, Paper & Forestry, Rubber Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Anderson*, 9 F.4th 328, 332–33 (5th Cir. 2021). As discussed in detail *supra*, Clark, Cooper, and Green have failed to identify an adequate comparator, and the Court will not reexamine their arguments to the contrary. *See id.* (dismissal proper where "none of the officers [plaintiff] identifie[d] had disciplinary histories [comparable] to his [and] none had [his level of] experience[.]").

specific evidence in the record and to articulate precisely how this evidence supports his claim.") (internal citations omitted). Looking at timing alone, there is thus insufficient evidence from which a jury could infer a causal connection between Clark, Cooper, and Green's contact with their attorney and the FBI and their respective adverse employment actions. *See generally* [Docs. 89, 107]; *see also Mooney v. Lafayette Cnty. Sch. Dist.*, 538 F. App'x 447, 454 n.7 (5th Cir. 2013) (noting that "temporal proximity is just *one* of the elements in the entire calculation of whether plaintiff had shown a causal connection between the protected activity and the subsequent [adverse employment action].") (cleaned up) (emphasis added).

Finally, even assuming Clark, Cooper, and Green could establish a *prima facie* case of First Amendment retaliation, an employer "may avoid liability by showing a legitimate reason for which it would have discharged [or demoted] the employee even in the absence of [the employee's] protected conduct." *United Steel, Paper & Forestry, Rubber Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Anderson*, 9 F.4th 328, 330 (5th Cir. 2021) (describing the so-called *Mt. Healthy* defense) (internal citations omitted). As described at length above, it is undisputed that: (i) Clark repeatedly misused APD's NCIC "Thinkstream" database to conduct searches unrelated to his duties with the APD; (ii) Cooper failed a polygraph examination and conducted an unauthorized investigation of another APD officer; and (iii) Green lied during an Internal Affairs investigation. *See supra*. Because these facts justify the adverse employment actions taken against Clark, Cooper, and Green, summary judgment is appropriate as to their First Amendment retaliation claim.

V. Eavesdropping Claims

Finally, Clark, Cooper, and Green maintain that on June 13, 2019, Chief King "intercepted a conversation they were having about an accident in which [Chief] King was involved" in violation of 18 U.S.C. § 2511. [Doc. 107, p. 52]; [Doc. 89, ¶ 66]. Mr. Green's affidavit describes the facts supporting this claim as follows:

> [Chief] King had a collision in a city vehicle, did not report the accident, and left the scene of the collision. Reginald Cooper, Darrell Clark, and I were on the back lot talking about how [Chief] King had wrecked the vehicle. After ten to fifteen minutes of that conversation, [Chief] King burst out the door and started yelling at us about "if we wanted to know something about him and the accident, we needed to ask him." We knew [Chief] King was not in our conversation and clearly had been listening to our conversation from the camera system. I [later] asked [another APD officer] if the camera system had sound and he replied, "Yes."

[Doc. 107-5, p. 9].

Colloquially known as the Wiretap Act, 18 U.S.C. § 2511 "imposes criminal liability upon any person who 'intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication.'" *DIRECTV, Inc. v. Bennett*, 470 F.3d 565, 569 (5th Cir. 2006). In tandem with 18 U.S.C. § 2520, this statute also "provide[s] a [civil] private cause of action for the intentional interception of electronic communi-

cations, including both satellite and cable transmissions." *Joe Hand Promotions, Inc. v. Breaktime Bar, LLC*, 2014 WL 1870633, at *1 n.3 (W.D. La. May 8, 2014).

With respect to the civil cause of action, 2511(1)(c) and (d) of the Wiretap Act "prohibits the intentional disclosure or use of information obtained through a wire intercept if the person doing so 'knew or had reason to know that the interception itself was in violation of [the Wiretap Act]'. Liability for disclosure or use requires proof that it was intentional, that the information was obtained from an intercepted communication, and that the defendant knew or should have known that the interception was illegal. Accordingly, 'knowledge or reason to know of the illegality is an element of this offense'. *Forsyth v. Barr*, 19 F.3d 1527, 1538 (5th Cir. 1994) (internal citations omitted).

With respect to the incident described above, Clark, Cooper, and Green maintain that "[the] City and [Chief] King have intentionally intercepted . . . [their] oral communications in violation of 18 U.S.C. § 2511(1)(a) . . . [and that] there is a strong likelihood that [both] Defendants are now engaging in and will continue to engage in the above-described intentional interception . . . and that likelihood represents a credible threat of immediate future harm." [Doc. 89, ¶¶ 93, 95]. Although the Complaint is unclear, Clark, Cooper, and Green presumably seek injunctive relief provided by 18 U.S.C. § 2520(b)(1) as well as possibly statutory damages contemplated by § 2520(b)(2). Even assuming this statute is applicable to the facts alleged – which is questionable – their claim nonetheless fails.

First, as discussed above, Chief King has asserted qualified immunity with respect to every claim brought

against him individually. *See generally* [Doc. 100-1]. Although a "good-faith assertion of qualified immunity" means the plaintiff bears the burden of establishing its inapplicability, Plaintiffs' Opposition entirely ignores the applicability of the defense. *See generally* [Doc. 107]; *Orr v. Copeland*, 844 F.3d 484, 490 (5th Cir. 2016) (noting that "[the] assertion of qualified immunity alters the usual summary judgment burden of proof, shifting it to the plaintiff to show that the defense is not available.").

Second, the record is devoid of evidence that Chief King overheard – intentionally or otherwise – Plaintiffs' conversation using the APD's camera system or, if he did, that he unlawfully disclosed or used the information obtained from his alleged intercept. *Forsyth*, 19 F.3d at 1538 (5th Cir. 1994). Accordingly, summary judgment is appropriate as to Plaintiffs' claims under 18 U.S.C. § 2511.

CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendant's MOTION FOR SUMMARY JUDGMENT [Doc. 100] is GRANTED, and that all claims asserted by Plaintiffs Darrell Eugene Clark, Reginald David Cooper, Markiz Marta Hood, Cedric Linbert Green, and Tyrika Trenea Love are DISMISSED WITH PREJUDICE.

THUS, DONE AND SIGNED in Chambers on this 12th day of September 2023.

/s/ David C. Joseph
United States District Judge

ORDER DENYING PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (OCTOBER 16, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DARRELL EUGENE CLARK; REGINALD DAVID COOPER; CEDRIC LINBERT GREEN,

Plaintiffs-Appellants,

v.

CITY OF ALEXANDRIA; DARYL LOUIS TERRY; JARROD DANIEL KING; PATRICK RAMON VANDYKE; CHRISTOPHER LOUIS COOPER,

Defendants-Appellees.

No. 23-30732

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 1:20-CV-1581

Before: JONES, SMITH, and HO,
Circuit Judges.

ON PETITION FOR REHEARING EN BANC

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

PROVISIONS OF LAW INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), provides in relevant part

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

42 U.S.C. § 1983 provides in relevant part

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . "

PETITION FOR REHEARING EN BANC
(OCTOBER 2, 2024)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 23-30732

DARRELL EUGENE CLARK; REGINALD DAVID COOPER; CEDRIC LINBERT GREEN,

Plaintiffs-Appellants,

versus.

CITY OF ALEXANDRIA; DARYL LOUIS TERRY; JARROD DANIEL KING; PATRICK RAMON VANDYKE; CHRISTOPHER LOUIS COOPER,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana,
No. 1:20-cv-1581

PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

Clark v. City of Alexandria

No. 23-3072

The undersigned counsel of record certifies, pursuant to Rule 28.2.1, that the following listed persons have an interest in the outcome of these proceedings. These representations are made in order that the honorable Judges of this Court may evaluate possible disqualification or recusal.

1. *Plaintiffs-Appellants*: Darrell Eugene Clark, Reginald David Cooper, Cedric Linbert Green
2. *Counsel for Plaintiffs-Appellants*: Meghan Harwell Bitoun
    a. *Former Counsel for Plaintiffs-Appellants*: Brett Lester Grayson
3. *Defendants-Appellees*: City of Alexandria, Daryl Louis Terry, Jarrod Daniel King, Patrick Ramon VanDyke, Christopher Louis Cooper
4. *Counsel for Defendants-Appellees*: Joshua J. Dara, Michael J. O'Shee, Steven M. Oxenhandler

New Orleans, Louisiana this 2nd day of October, 2024.

/s/ Meghan Harwell Bitoun
La. Bar No. 32493

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INTRODUCTION AND RULE 35(B) STATEMENT

Darrell Clark, Reginald Cooper, and Cedric Green were police officers at the Alexandria Police Department for 28, 32, and 30 years, respectively.[1] In this case they allege, *inter alia*, a Title VII claim under 42 U.S.C. 2000e-2(a)(1) that they were discriminated against in a manner that was "sufficiently severe or pervasive" to affect a term, condition, or privilege of their employment. After their original brief was filed, the United States Supreme Court issued its ruling in *Muldrow v. City of St. Louis, Missouri*, 144 S.Ct. 967 (2024), which interpreted a discriminatory transfer case under 42 U.S.C. 2000e-2(a)(1). Clark, Cooper, and Green supplied the court with a 28(j) letter informing the court of this opinion on August 6, 2024, but the panel did not acknowledge the case. *En banc* review is called for here to provide for full briefing on the issue, to ensure that this Circuit's application of Title VII standards aligns with the Supreme Court's most recent guidance.

In addition, this case presents issues of exceptional importance concerning the application of First Amendment retaliation standards and the Louisiana whistleblower claim in the summary judgment context. The question presented is: (1) Whether the panel erred in affirming summary judgment by misapplying the

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[1] *See Clark, et al. v. City of Alexandria, et al.*, 23-30732, at p. 2 (5th Cir. 2024).

causation and pretext standards established in *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274 (1977) and *Beattie v. Madison County Sch. Dist.*, 254 F.3d 595 (5th Cir. 2001).

STATEMENT OF THE CASE

Clark, Cooper, and Green, plaintiffs-appellants herein, all multidecade-officers of the Alexandria Police Department ("APD") brought claims related to Title VII workplace discrimination and First Amendment retaliation after they were fired (Clark and Cooper) and demoted (Green). They had risen through the ranks of the department, but their final months at the APD were marked by racial discrimination related to their rank (Chief King called black command staff "Colored Coalition" ROA.7135), and they were subjected to a series of investigations soon after reporting to the FBI an officer-involved incident of excessive force.[2] APD's investigations led to Clark and Cooper being fired, and Green demoted. Their claims were dismissed on summary judgment on September 12, 2023. ROA.7149. Clark, Cooper, and Green appealed, and a 3-judge panel of this Court affirmed the district court's grant of summary judgment on September 18, 2024. *See Clark, et al. v. City of Alexandria, et al.*, 23-

[2] *See Brown v. City of Alexandria*, 2022 WL 2873666 at *5 (W.D. La. 2022), (Not Reported in Fed. Supp.). The district court in the Daquarius Brown case denied summary judgment as to the excessive force claim, finding: "Based on Brown's account and the available video and audio evidence, the Court finds that a jury could reasonably conclude that Lt. Rachal struck an unresisting Brown on the head and body with his pistol. Such use of force would be excessive and unreasonable."

30732 (5th Cir. 2024). Clark, Cooper, and Green now timely request rehearing *en banc*.

REASONS FOR GRANTING REHEARING *EN BANG*

En banc review is reserved for exceptional cases that break from established precedent or present urgent issues meriting the full Court's consideration. The decision here calls for rehearing for both reasons.

I. The Panel Failed to Consider Recent Supreme Court Precedent in *Muldrow v. City of St. Louis, Missouri*

Clark, Cooper, and Green allege a hostile work environment claim, alleging that defendants discriminated against them in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e [Section 703], *et seq*. *See* ROA.1514. Under this provision, it is an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . "

On August 6, 2024, the plaintiffs filed a 28(j) letter bringing to the Court's attention the recent Supreme Court decision in *Muldrow v. City of St. Louis, Missouri*, 144 S.Ct. 967 (Apr. 14, 2024), which was decided after plaintiffs filed their original brief in this matter (February 16, 2024), and which interprets 42 U.S.C. § 2000e-2(a)(1). The panel's decision, however, does not acknowledge the *Muldrow* decision. Plaintiffs request rehearing *en banc* to fully brief the matter before the court.

In *Muldrow*, the Supreme Court held that an employee alleging a Title VII claim for discriminatory transfer under 42 U.S.C. 200e-2(a)(1) "need only show some injury respecting her employment terms or conditions," rather than the previous standard which required "significant harm." *Muldrow*, 144 S.Ct. at 976-77. *Muldrow* has implications in evaluating workplace harassment claims under this statute, including those brought by Clark, Cooper, and Green.

Clark, Cooper, and Green suggested that although *Muldrow* specifically dealt with a discriminatory transfer, its interpretation of 42 U.S.C. 2000e-2(a)(1) would control. *See* August 6, 2024 28(j) Letter. That is, *Muldrow* represents the Supreme Court's most recent interpretation of 42 U.S.C. 2000e-2(a)(1), the same statute involved here. On appeal, Clark, Cooper, and Green presented claims regarding years of workplace harassment on the basis of race. The panel affirmed the district court's grant of summary judgment as to Clark, *see Clark*, 23-30732 at 9, Cooper, *see id*. at 11, and Green, *see id*. at 12. One aspect of this claim was that their rise in the ranks of the APD accompanied changes in their treatment in the workplace: they were referred to as the "Colored Coalition," and they were circumvented in the chain of command. On this issue, the district court found, "To be clear, this allegation – that Chief King described his leadership team as "the colored coalition" – both related to race and is objectively and subjectively offensive." ROA.7135.

In addition, the evidence that Chief King began circumventing the authority of his black commanding officers. Clark testified that King circumvented the Black commanders, that King would go directly to

officers under Clark's command to give assignments or get information, and they would hold meetings without Clark. ROA.3944-46. Although Cooper was Assistant Chief, King regularly bypassed Cooper in the chain of command and had Cooper's subordinates report directly to King. ROA.1408-09. Green was not invited to staff meetings. ROA.238.

The panel affirmed the dismissal of the hostile work environment claims. *See Clark*, 23-30732 at pp. 8-12. As the district court emphasized, Clark, Cooper, and Green failed to alleged sufficiently severe or pervasive conduct altering the conditions of employment and thereby creating an abusive working environment. ROA.7136 (Clark), ROA.7139 (Cooper), ROA.7140 (Green). The panel recognized that the standard for workplace harassment in this Court is high, and that the allegation regarding the Colored Coalition "failed to rise to a level of hostile work environment as required by our precedent." *See Clark* at 9.

However, under *Muldrow*'s more lenient standard, the circumstances of Clark, Cooper, and Green's workplace harassment claims were sufficient to affect a term, condition, or privilege of their employment. The use of racially charged language (the Chief referring to the black command staff as the "colored coalition" ROA.7135) combined with the systematic undermining of their authority, constitutes "some injury respecting their employment terms or conditions," as set forth by *Muldrow*.

The Supreme Court's reasoning in *Muldrow* has implications that extend beyond discriminatory transfer cases. Clark, Cooper, and Green respectfully request that this Court grant rehearing to apply this reasoning to hostile work environment claims, potentially re-

quiring a reconsideration of the "severe or pervasive" standard long applied in such cases. Under this proposed interpretation, Clark, Cooper, and Green's experiences would meet the statutory threshold. First, they were subjected to racially-charged language that had to do with both their race and their rank ("colored coalition") by their superior, Chief King. *See* ROA.7135. And second, their categorization by race and rank was accompanied by tangible effects on their employment: the circumvention of their authority as commanding officers. ROA.3944-46 (circumventing Clark); ROA.1408-09 (circumventing Cooper); ROA.238 (circumventing Green). Here, Clark, Cooper, and Green were treated differently on the basis of race in a manner that affected a term, condition, or privilege of their employment, satisfying the statutory requirements without necessitating an inquiry into the severity or pervasiveness of the conduct.

Adopting this approach would shift the focus from subjective assessments of offensiveness to the actual impact on employment conditions, as intended by the language of the statute. For example, current jurisprudence requires egregious conduct, such as a supervisor directly using the n-word, to establish a hostile work environment. *See*, *e.g.*, *Walker v. Thompson*, 214 F.3d 615, 619-22 (5th Cir. 2000). Under the proposed *Muldrow*-inspired approach, the emphasis would be on whether the racial discrimination affected employment terms or conditions, regardless of the perceived severity of individual incidents. Such an interpretation would realign the analysis with the statutory language, keeping the focus on the effects of discrimination rather than arbitrary assessments of its offensiveness.

This streamlined analysis would focus on the truly relevant questions: (1) Was the employee treated differently on the basis of a protected characteristic? And (2) Did this treatment affect a term, condition, or privilege of employment? For Clark, Cooper, and Green, the answer to both questions is: yes. Under this analysis, there is a genuine issue of material fact on their hostile work environment claims that should have precluded summary judgment.

Given that *Muldrow* was decided after the plaintiffs filed their initial brief, Clark, Cooper, and Green request that this Court should grant rehearing *en banc* to consider whether Muldrow's reasoning should be extended to hostile work environment claims. Specifically, plaintiffs request that this Court consider whether the "severe or pervasive" requirement – a judicial construct not found in the statute – should be eliminated in favor of a direct application of the statutory language.

II. The Panel Erred in Affirming Summary Judgment By Misapplying the Causation and Pretext Standards Established in *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274 (1977) and *Beattie v. Madison County Sch. Dist.*, 254 f.3d 595 (5th Cir. 2001)

This case concerns critical legal standards applicable to police officer First Amendment rights on summary judgment—as the claim of First Amendment retaliation draws subtle but critical distinctions from a Title VII retaliation claim on summary judgment.

Clark, Cooper, and Green discussed APD's civil rights violations with attorneys and reported same to the FBI in March of 2020. ROA.5169. On March 18,

2020, Clark, Cooper, and Green met at a church to discuss what could be done about the cover-up of the officer-involved excessive force incident. *See* ROA.5157. They had a discussion with an attorney on that date, and they reported the matter to the FBI in late March, 2020. ROA.5169. After these March meetings, Cooper's interrogations began in May, 2020, and he was fired on July 20, 2020. *See* ROA.1405-1409. Clark was interrogated through the summer and fired on June 25, 2020. *See* ROA.7020-7032. Green was subjected to a series of investigations (beginning with being falsely accused of "payroll fraud" in April of 2020) under a timeline extended needlessly by the department and culminating in a December 2020 polygraph examination. *See* ROA.7048-ROA.7054. Green's questioning regarding that polygraph extended into January of 2021, and he was demoted on February 26,2021. *See* ROA.7054. These allegations show that there exist issues of material fact as to the causal connection between Clark, Cooper, and Green's protected speech to their attorney and the FBI and their subsequent firings/demotion.

The panel recognized that "that sequence of events could have created a plausible inference of causation." *See Clark*, 23-30732 at pp. 13-14. Nonetheless, the court affirmed the district court's grant of summary judgment as to Clark, Cooper, and Green's First Amendment retaliation claims for their failure to show causation as well as pretext. *See* Clark at p. 13-14. In finding that the plaintiffs failed to establish causation, the panel stated:

> But, shortly after linking those, plaintiff undercut their assertions entirely, pointing out that the city learned about the FBI

> report during the investigations. In other words, the plaintiffs' own evidence states that the FBI report did not motivate the investigations. They have presented a chronology that leads to the inescapable conclusion that King and APD were investigating Clark, Cooper, and Green before they found out about the report to the FBI. Therefore, the claims of First Amendment retaliation cannot survive. *See id*. at 14.

Because this matter was being reviewed on summary judgment, plaintiffs pointed out that there was a genuine issue of material fact as to when the APD learned that they had gone to the FBI. The district court granted summary judgment on grounds that Clark, Cooper, and Green had not established the date on which they reported to the FBI. *See* ROA.7145 ("Second, although 'close timing between an employee's [speech] and an adverse employment action can be a sufficient basis for a court to find a causal connection,' neither Clark, Cooper, nor Green have identified any evidence as to when they allegedly reported this conduct to their attorney and the FBI or when the APD learned of this alleged contact.") The APD, on appeal, argued that it did not learn plaintiffs had gone to the FBI until July 15, 2020, at Cooper's pre-disciplinary hearing. *See* Appellee Brief at p. 26. Plaintiffs pointed out that the disputed timeline of events established a genuine issue of material fact and that the claim should have survived summary judgment. Clark, Cooper, and Green sufficiently established that the temporal proximity between their protected speech and the adverse employment actions support their allegation of a causal connection between the two.

Their investigations and disciplinary actions which followed their reporting to the FBI in late March of 2020 were in retaliation for that reporting.

The panel also affirmed summary judgment as to Clark, Cooper, and Green's retaliation claim, by finding that plaintiffs "have not shown pretext. *Beattie*, 254 F.3d at 601." *See Clark*, 23-30732 at p. 14. The relevant standard for First Amendment retaliation, as set forth in *Beattie* provides the following:

> To prevail, Beattie must show that she engaged in protected conduct and that it was a motivating factor in her discharge. Then, the burden shifts to defendants to show by a preponderance of the evidence that they would have come to the same conclusion in the absence of the protected conduct. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

Beattie, at 601. It is this standard—that the defendants must show that they would have come to the same conclusion in the absence of the protected conduct—that the City should have been, but was not, required to meet. It should be noted that the City alleged that the higher standard enunciated under Title VII claims applied here. *See* Appellee Brief at 33 (*quoting Hague v. University of Texas Health Science Center at San Antonio*, 560 Fed. Appx. 328 (5th Cir. 2014), that plaintiffs could only show pretext by showing "'a conflict in substantial evidence' on the question of whether the employer would not have taken the action 'but for' the protected activity.")

Clark, Cooper, and Green maintained that the timeline itself established that the City could not have come to the same employment decision even in the absence of their protected speech to the FBI. The timing of the City's investigations against them—starting after they reported to the FBI—militates against such a conclusion. The panel acknowledges that Clark, Cooper, and Green had little, if any, disciplinary history. *See Clark*, 23-30732 at p. 3. Clark, Cooper, and Green's investigations that ultimately led to their adverse employment actions were intricately connected to their reporting to the FBI. *See* ROA.4085,[3] *and see* ROA.7024.[4] During Cooper's investigation, he was told, "telling the FBI was a fatal mistake." ROA.1409. The City did not meet its burden of showing that it would have taken the same action against Clark, Cooper, and Green even in the absence of their protected speech. There was sufficient evidence of causation and pretext under the *Mt. Healthy* standard such that Clark, Cooper, and Green's First

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[3] ROA.4085. Cooper's deposition in *Daquarius Brown v. City of Alexandria*, provides this question to and answer from Cooper:

Q: And when they first started the investigation that ultimately led to your discharge, did one of the things that was complained about as the purpose or cause of that investigation the report to the FBI?

Cooper: Yes.

[4] Clark's affidavit alleging, "In June 2020, I was a subject of a 60-day illegal investigation by Attorney Joshua Dara of the Gold Law Firm for reporting to the Federal Bureau of Investigation the 2019 use of excessive force during the arrest of Daquarious Brown, an African American teenager, by Kenneth Rachal, a white lieutenant within the Criminal Investigation Division of the APD".

Amendment retaliation claim should have survived summary judgment. The panel erred in finding otherwise.

CONCLUSION

Petitioners respectfully request that this Court grant rehearing *en banc*.

Respectfully submitted,

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October 2, 2024

{ Certificates omitted }