No. 23A-

IN THE

SUPREME COURT OF THE UNITED STATES

MARLEAN A. AMES,

Applicant,

v.

OHIO DEPARTMENT OF YOUTH SERVICES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI

TO: The Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, Applicant Marlean Ames respectfully requests an extension of fourteen (14) days in which to file a petition for a writ of certiorari in this case. The U.S. Court of Appeals for the Sixth Circuit issued its decision on December 4, 2023. *See Ames v. Ohio Dept. of Youth Services*, 87 F.4th 822 (6th Cir. 2023); Exh. 1. Absent extension, the deadline to file a petition for writ of certiorari will be March 4, 2024. With the requested extension, the petition would be due on March 18, 2024. This application is being filed at least ten days before the petition is due. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). In support of this application, Applicant states:

1. Title VII of the Civil Rights Act makes it unlawful for an employer to "discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Though the statute's language is unequivocal—"codify[ing] a categorical rule of 'individual equality,'" *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 290 (2023) (Gorsuch, J., concurring)—five circuits have read the provision "to impose different burdens on different plaintiffs *based on their membership in different demographic groups*," Exh. 1 at 7 (Kethledge, J., concurring) (emphasis in

original). In those circuits, majority-group plaintiffs must, in addition to Title VII's other requirements, show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Zambetti v. Cuyahoga Cmty. Coll.*, 314 F.3d 249, 255 (6th Cir. 2002) (cleaned up). But not all courts have embraced the background circumstances requirement.

2. Background circumstances proved dispositive for Marlean Ames. Ames is a heterosexual woman, who has worked for the Ohio Department of Youth Services ("the Department") for two decades, starting out as a secretary before earning several promotions and becoming a program administrator. *Id.* at 2. She has received "reasonably good" reviews for her performance. *Id.* at 3. In 2017, Ames started reporting to Ginine Trim, a gay woman. In 2018, she applied to be the Department's Bureau Chief of Quality; she was not selected despite receiving positive feedback during the interview. Then, in 2019, the Department informed Ames that she was being removed from her position as program administrator. The Department selected a gay man as her replacement, even though he was not qualified and did not even apply for the position. The Bureau Chief promotion that Ames had previously applied for was offered to a gay woman, who also had not applied for the job and lacked the minimum qualifications for the role. Thus, "twice in one year the Department promoted an arguably less-qualified gay employee in a manner adverse to Ames." *Id.* at 7 (Kethledge, J., concurring).

3. As the Sixth Circuit noted, but-for the background circumstances requirement, "Ames's prima-facie case was easy to make." *Id.* at 3. She sued under

a protected ground (sexual orientation), was denied promotion in favor of a gay individual, and was later demoted and replaced by another gay individual. *Id.* But her Title VII foundered because Ames had not produced "evidence that a member of the relevant minority group (here, gay people) made the employment decision at issue" or "statistical evidence showing a pattern of discrimination by the employer against members of the majority group." *Id.* at 4.

4. This case is a serious candidate for review. There is an entrenched circuit split on whether majority-group plaintiffs must show background circumstances. As Judge Kethledge observed in his concurrence in this case, five circuits apply the background circumstances rule. The D.C. Circuit first applied the background circumstances rule in *Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012 (D.C. Cir. 1981). Four circuits—the Sixth, Seventh, Eighth, and Tenth—followed the D.C. Circuit's in short order, imposing this heightened burden for majority-group plaintiffs. Exh. 1 at 8 (Kethledge, J., concurring) (citing cases). On the other hand, the Third and the Eleventh Circuits have explicitly rejected the rule. *See Iadimarco v. Runyon*, 190 F.3d 151, 160 (3d Cir. 1999); *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1325 n.15 (11th Cir. 2011). Five additional circuits have neither endorsed nor rejected the test. The Second, Fourth, and Ninth Circuits have explicitly declined to decide the issue, leading to significant dis-uniformity among district courts within these circuits. *See, e.g.*, *Aulicino v. N.Y. City Dep't*, 580 F.3d 73, 80 n.5 (2d Cir. 2009); *Presley v. Beaufort Cnty. Sch. Dist.*, 2020 WL 9216305, at *9 (D.S.C. July 9, 2020); *Zottola v. City of Oakland*, 32 F. App'x 307, 311 (9th Cir. 2002). The First and Fifth

Circuits have not applied the background circumstances rule. *See, e.g.*, *Williams v. Raytheon*, 220 F.3d 16, 19 (1st Cir. 2000); *Young v. City of Houston*, 906 F.2d 177 (5th Cir. 1990).

5. The background circumstances rule is also ripe for closer examination because it does not comport with the text of Title VII or Supreme Court precedent. On the former, imposing background circumstances "is not a gloss upon the 1964 [Civil Rights] Act, but a deep scratch across its surface." App. 1 at 8 (Kethledge, J., concurring). And on the latter, this Court has emphasized time and again that Title VII's reach extends to all parties, with the statute's "terms are not limited to discrimination against members of any particular race" or group. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278–79 (1976); *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1737 (2020). Finally, the rule produces serious administrability problems. The concept of background circumstances "is irredeemably vague and ill-defined." *Iadimarco v. Runyon*, 190 F.3d 151, 161 (3d Cir. 1999). Courts, including in circuits that have adopted the rule, have expressed "serious misgivings about the soundness of the test." *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 n.7 (6th Cir. 1994).

6. In sum, this case presents substantial and recurring questions on which the federal circuit courts are divided. As a result of this split, there is a reasonable prospect that this Court will grant the petition, such that it warrants additional time for these important questions to be fully addressed.

7. Mr. Gilbert and the University of Virginia Supreme Court Litigation Clinic are working diligently to prepare the petition, but need additional time to complete, print, and file Applicant's petition. Applicant recently requested assistance from the Clinic. The extension is needed for Clinic faculty and staff to fully familiarize themselves with the record, the decisions below, and the relevant case law. The Clinic anticipates, over the next three weeks, filing a petition for a writ of certiorari in *Spencer v. County of Harrison*, *Texas* (23A603), as well as a petition in two other cases that have not yet been docketed.

8. In addition, Mr. Gilbert faces several overlapping deadlines in other matters during the existing time for preparation of a petition for writ of certiorari in this case, including an evidentiary hearing and briefing in *Elizabeth Missionary Baptist Church v. Reynolds* (Summit County, CV-2022-11-3829); factual discovery in *Valentino v. Louis* (Trumbull County, CV-2023-01786); and briefing in *Summit County Child Services v. Ohio Civil Rights Commission* (Summit County, CV-2023-10-3782).

9. In light of the Clinic and Mr. Gilbert's obligations, including preparing three petitions for certiorari and assisting with various circuit court proceedings, the Clinic would face significant challenges completing the petition by the current due date.

For these reasons, Applicant requests this Court grant an extension of fourteen days to and including March 18, 2024, within which to file a petition for a writ of certiorari in this case.

Respectfully submitted,

_____/s/ Xiao Wang_____________

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February 22, 2024

APPLICATION EXHIBITS

TABLE OF CONTENTS

EXH. 1 – SIXTH CIRCUIT OPINION (DEC. 4, 2023) 1a

EXH. 2 – DISTRICT COURT ORDER (MAR. 16, 2023)... 10a

EXH. 3 – DISTRICT COURT ORDER (MAR. 29, 2022)... 36a

EXHIBIT 1

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0264p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARLEAN A. AMES,
Plaintiff-Appellant,

v.

OHIO DEPARTMENT OF YOUTH SERVICES,
Defendant-Appellee.

No. 23-3341

Appeal from the United States District Court for the Southern District of Ohio at Columbus.
No. 2:20-cv-05935—Algenon L. Marbley, District Judge.

Decided and Filed: December 4, 2023

Before: MOORE, McKEAGUE, and KETHLEDGE, Circuit Judges.

COUNSEL

ON BRIEF: Edward L. Gilbert, EDWARD L. GILBERT CO., L.P.A., Akron, Ohio, for Appellant. Cathleen B. Slater, Megan E. Jewett, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

The court delivered a PER CURIAM opinion. KETHLEDGE, J. (pp. 7–8), delivered a separate concurring opinion.

OPINION

PER CURIAM. Marlean Ames sued the Ohio Department of Youth Services under Title VII of the Civil Rights Act of 1964, asserting claims of discrimination based on sexual orientation and sex. The district court granted summary judgment to the Department, holding that Ames lacked evidence of "background circumstances" necessary to establishing her prima-

facie case for her claim based on sexual orientation, and that Ames lacked evidence of pretext for purposes of her sex-discrimination claim. We affirm.

I.

We view the evidentiary record in the light most favorable to Ames. *See Sloat v. Hewlett-Packard Enter. Co.*, 18 F.4th 204, 207 (6th Cir. 2021).

The Ohio Department of Youth Services oversees the confinement and rehabilitation of juvenile felony offenders in the state. The Department hired Ames, a heterosexual woman, in 2004, and in 2014 it made her its Administrator of the Prison Rape Elimination Act (which the Department referred to as "PREA"). The position was "unclassified," meaning that Ames was an at-will employee who could be dismissed without cause. Ohio Rev. Code § 124.11.

In 2017, Ames was assigned a new supervisor, Ginine Trim, who is gay. Trim reported to Assistant Director Julie Walburn. In a December 2018 performance evaluation, Trim said that Ames met "expectations" in ten competencies and exceeded them in one. In January 2019, Ohio's governor appointed Ryan Gies to be the Department's Director. Walburn and Gies are both heterosexual.

In April 2019, Ames applied and interviewed to be the Department's Bureau Chief of Quality. The Department chose not to hire her for that position. In a conversation after the interview, Trim congratulated Ames on 30 years of public service, but also suggested that Ames retire. Four days later, on May 10, 2019, Walburn and Human Resources Administrator Robin Gee called Ames into a meeting where they terminated her as PREA Administrator and gave her the option of returning to her previous position, which would amount to a demotion. Ames took the demotion, reducing her wages from $47.22 an hour to $28.40. The Department then selected Alexander Stojsavljevic, a 25-year-old gay man, for the position of PREA Administrator, informing him two business days later of his promotion. Later, in December 2019, the Department chose Yolanda Frierson, a gay woman, as its Bureau Chief of Quality.

Ames later filed a discrimination charge with the Equal Employment Opportunity Commission, which issued a right-to-sue letter. Ames then brought this suit, in which the district court granted summary judgment. This appeal followed.

II.

We review the district court's grant of summary judgment de novo. *See Spees v. James Marine, Inc.*, 617 F.3d 380, 388 (6th Cir. 2010).

Ames sought to prove her discrimination claims by indirect evidence, which required her to show the following: (1) that she was a member of a protected class; (2) that she was subject to an adverse employment decision; (3) that she was qualified for the relevant position; (4) and that her employer treated more favorably a similarly qualified person who was not a member of the same protected class. *Jackson v. VHS Detroit Receiving Hosp., Inc.*, 814 F.3d 769, 776 (6th Cir. 2016).

A.

We begin with Ames's claim of discrimination based on sexual orientation, in which she says the Department discriminated against her when it denied her a promotion to Bureau Chief and demoted her from the position of PREA Administrator. Ames is heterosexual, however, which means she must make a showing in addition to the usual ones for establishing a prima-facie case. Specifically, Ames must show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Arendale v. City of Memphis*, 519 F.3d 587, 603 (6th Cir. 2008) (cleaned up)*; see also Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985).

Whether Ames made the necessary showing of "background circumstances" is the principal issue here. For otherwise Ames's prima-facie case was easy to make: her claim is based on sexual orientation, which is a protected ground under Title VII, *see Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020); she was demoted from her position as PREA Administrator and had held that position for five years, with reasonably good reviews; and she

was replaced by a gay man. Moreover, for the Bureau Chief position that Ames was denied, the Department chose a gay woman.

Where Ames founders, however, is on the requisite showing of "background circumstances." Plaintiffs typically make that showing with evidence that a member of the relevant minority group (here, gay people) made the employment decision at issue, or with statistical evidence showing a pattern of discrimination by the employer against members of the majority group. *See Zambetti v. Cuyahoga Cmty. Coll.*, 314 F.3d 249, 257 (6th Cir. 2002); *Sutherland v. Mich. Dep't of Treasury*, 344 F.3d 603, 615 (6th Cir. 2003). But Ames has made neither showing. First, Ames was terminated as PREA Administrator by Walburn and Gies, who are both heterosexual. Ames does argue that Trim, a gay woman, was the person who denied her the position of Bureau Chief and who instead chose Frierson, who is also gay. But Ames argued in the district court that Walburn and Gies were the decisionmakers for that position, which means that Ames's argument that Trim was the decisionmaker is forfeited. *See Watkins v. Healy*, 986 F.3d 648, 667 (6th Cir. 2021). Second, Ames's only evidence of a pattern of discrimination against heterosexuals is her own demotion and the denial of the Bureau Chief position. Under our caselaw, however, a plaintiff cannot point to her own experience to establish a pattern of discrimination. *See Sutherland*, 344 F.3d at 615 (requiring statistical evidence beyond plaintiff's own experience to prove pattern); *see also Treadwell v. Am. Airlines, Inc.*, 447 F. App'x 676, 678-79 (6th Cir. 2011).

Ames therefore has not made the necessary showing of "background circumstances." For that reason her claim of sexual-orientation discrimination fails.

B.

Ames next argues that a jury could find that she was demoted from her position as PREA Administrator because of her sex. The Department concedes that Ames has stated a prima-facie case as to this claim, because she was replaced by a man. But the Department has provided nondiscriminatory reasons for her demotion: namely, that Gies had been appointed Director of the Department a few months before, in January 2019; that Gies wanted to improve the Department's performance regarding "sexual victimization[,]" and wanted "people in places that

can fulfill the vision of moving us forward, not just meeting minimum standards"; and that Ames's 2018 evaluation showed she mostly met expectations rather than exceeded them, and needed improvement in some areas.

To demonstrate pretext, a plaintiff must ultimately prove both that her employer's stated reason for the adverse employment decision "was not the real reason for its action, *and* that the employer's real reason" was discrimination. *E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 767 (6th Cir. 2015) (en banc). At summary judgment, however, a plaintiff need only produce evidence that would allow a jury to find that her employer's stated reason "is unworthy of credence." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147 (2000); *see Miles v. S. Cent. Hum. Res. Agency, Inc.*, 946 F.3d 883, 888 (6th Cir. 2020). To that end, a plaintiff can typically create a genuine issue of fact by producing evidence that the employer's stated reason (1) had no basis in fact; (2) did not actually motivate the employer's actions; or (3) was insufficient to motivate the employer's actions. *See Briggs v. Univ. of Cincinnati*, 11 F.4th 498, 515 (6th Cir. 2021).

Ames contends that the Department's reasons for demoting her had no basis in fact. But Gies was in fact appointed in January 2019, a few months before Ames's demotion; and her evaluation the month before was lukewarm in many respects and critical in some others. Specifically, for 10 of 11 of the "competencies" for which Ames was evaluated, her rating was "meets expectations" rather than that she "exceeds" them. And in three areas—providing accurate guidance to "other groups[,]" "[p]erforming day-to-day (routine) administrative tasks[,]" and managing and distributing "all PREA grant-related funds[,]" the report noted that she had "an opportunity to improve[.]" The report therefore provides some support for the Department's stated reasons for demoting her, which means they had some basis in fact. Ames therefore has not created a genuine issue of fact on this ground. *See Miles*, 946 F.3d at 888-89 ("For a plaintiff's challenge to the factual basis of an employer's proffered termination rationale to establish pretext, the plaintiff must provide evidence that the employer's allegations never happened.").

Ames also contends that that the Department has offered shifting justifications for Ames's demotion, which in her view is evidence that the Department's stated reasons did not

actually motivate its decision to demote her. Ames is right that the Department has offered different reasons for her demotion at different times. When Walburn and Gee told Ames about her demotion, they refused to provide any reason for it. Later, before the EEOC, the Department said that it demoted Ames because her position was at-will and that it could remove her at any time without cause. And Gies, in his deposition, said that Ames was not the right person to fulfill his "vision" of exceeding PREA minimum standards rather than just meeting them. Absent some conflict between an employer's nondiscriminatory reasons for an adverse employment decision, however, that the employer offers more than one of them—even at different times—is not enough to create a genuine issue of fact as to pretext. *Miles*, 946 F.3d at 891. Hence this contention likewise falls short.

Finally, the Department's process for promoting Stojsavljevic to the PREA Administrator position was not so irregular as to create a genuine issue as to pretext. On that issue Ames provides no evidence other than her own experience in applying for the PREA Administrator position. Such evidence is insufficient. Nor were Ames's qualifications for that position so "objectively superior" to Stojsavljevic's as to create a genuine issue as to pretext. The district court was correct to grant summary judgment.

* * *

The district court's judgment is affirmed.

CONCURRENCE

KETHLEDGE, Circuit Judge, concurring. I join the court's opinion in full, but write to express my disagreement with the rule that we must apply here. Title VII of the Civil Rights Act of 1964 bars employment discrimination against "any individual"—itself a phrase that is entirely clear—"because of such individual's race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e-2(a)(1). Thus, to state the obvious, the statute bars discrimination against "any individual" on the grounds specified therein. Yet our court and some others have construed this same provision to impose different burdens on different plaintiffs *based on their membership in different demographic groups*. Specifically—to establish a prima-facie case when (as in most cases) the plaintiff relies upon indirect evidence of discrimination—members of "majority" groups must make a showing that other plaintiffs need not make: namely, they must show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Zambetti v. Cuyahoga Cmty. Coll.*, 314 F.3d 249, 255 (6th Cir. 2002) (cleaned up) (quoting *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985)).

Our panel is bound to apply this rule here, since Ames claims that the Department discriminated against her because of her status as a heterosexual. As a member of a majority group, Ames must make the requisite showing of "background circumstances"; and, as our opinion explains, she has not done so. Meanwhile, nobody disputes that Ames has established the other elements of her prima-facie case, which would be enough to establish that case if she were a gay person. And Ames's evidence of pretext is notably stronger for this claim than for her sex-discrimination one: twice in one year the Department promoted an arguably less-qualified gay employee in a manner adverse to Ames; and in promoting one of those employees, Yolanda Frierson, the Department circumvented its own internal procedures because Frierson lacked the minimum qualifications for the job. Thus—based our application of the "background circumstances" rule alone—we deny Ames a jury trial on this claim.

The "background circumstances" rule is not a gloss upon the 1964 Act, but a deep scratch across its surface. The statute expressly extends its protection to "any individual"; but our interpretation treats some "individuals" worse than others—in other words, it discriminates—on the very grounds that the statute forbids. Yet five circuits (including our own) have adopted the "background circumstances" rule since the D.C. Circuit first adopted it in 1981. *See Parker v. Balt. & Ohio R. R. Co.*, 652 F.2d 1012, 1017-18 (D.C. Cir. 1981); *Murray*, 770 F.2d at 67; *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 455-57 (7th Cir. 1999); *Hammer v. Ashcroft*, 383 F.3d 722, 724 (8th Cir. 2004); *Notari v. Denver Water Dep't*, 971 F.2d 585, 588-89 (10th Cir. 1992). Two circuits have expressly rejected this rule. *See Iadimarco v. Runyon*, 190 F.3d 151, 157-62 (3d Cir. 1999); *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1325 n.15 (11th Cir. 2011). Five others simply do not apply it. *See Williams v. Raytheon Co.*, 220 F.3d 16, 18-19 (1st Cir. 2000); *Aulicino v. N.Y.C. Dep't of Homeless Servs.*, 580 F.3d 73, 80-81 & n.5 (2d Cir. 2009); *Lightner v. City of Wilmington, N.C.*, 545 F.3d 260, 264-65 (4th Cir. 2008); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 426 (5th Cir. 2000); *Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1156 (9th Cir. 2010).

Respectfully, our court and others have lost their bearings in adopting this rule. If the statute had prescribed this rule expressly, we would subject it to strict scrutiny (at least in cases where plaintiffs are treated less favorably because of their race). And nearly every circuit has addressed this issue one way or another. Perhaps the Supreme Court will soon do so as well.

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MARLEAN A. AMES,	:	
	:	
Plaintiff,	:	
	:	**Case No. 2:20-cv-05935**
v.	:	
	:	**Chief Judge Algenon L. Marbley**
STATE OF OHIO DEPARTMENT OF YOUTH SERVICES,	:	**Magistrate Judge Elizabeth P. Deavers**
	:	
	:	
Defendant.	:	

OPINION & ORDER

This matter comes before the Court on the Motion for Summary Judgment of Defendant State of Ohio Department of Youth Services ("DYS" or "the Department"). (*See* ECF No. 71). This case arises from allegations of sex-based discrimination experienced by Plaintiff Marlean Ames in the course of her employment with DYS. For the reasons set forth more fully below, the Court **GRANTS** Defendant's motion.

I. BACKGROUND

A. Factual Background

There are two incidents at the core of Ames's allegations. The Court begins by laying out the background context of employment within a state agency, describes Ames's employment history with DYS, and then delves into the two incidents in detail.[1]

---

[1] The facts set forth below are largely drawn from Defendant's Motion for Summary Judgment (ECF No. 71), as Ames has stated that "[t]he Statement of Facts included in the Defendant's Motion for Summary Judgment is largely correct" and appears to adopt portions of Defendant's Statement of Facts verbatim in her reply brief. There are two exceptions. First, Ames suggests that Defendant has omitted one factual allegation regarding comments made by Alex Stojsaljevic. (Memo. in Opp'n at 1, ECF No. 72). The omitted allegation is included and discussed *infra*.

Ames also requests that the unsworn statements presented by Defendant's witnesses, which Defendant relies on in its Statement of Facts, be struck. (*Id.* at 1). Fed. R. Civ. P. 56(c) requires that "[a] party asserting that a fact cannot be . . . genuinely disputed must support the assertion by [] citing to particular parts of materials in the record,

1. The Ohio Civil Service and the Department of Youth Services

DYS is a state agency that oversees juvenile corrections, parole, and the rehabilitation of youth through community programs. *See generally* Ohio Rev. Code ch. 5139. The Department's offices consist of the agency headquarters located at the central office in Columbus, three (3) juvenile correctional facilities, and five (5) district sites for parole services. (*See* Declaration of Kelly East ("East Decl.") ¶ 4, ECF No. 71-4). The correctional facilities are: Circleville Juvenile Correctional Facility ("CJCF"); Cuyahoga Hills Juvenile Correctional Facility ("CHJCF"); and Indian River Juvenile Correctional Facility ("IRJCF"). *See Facilities*, OHIO DEP'T OF YOUTH SERVS., https://dys.ohio.gov/facilities/welcome.

The Department employs around 961 individuals, spread across nine divisions. (*See* Memo. in Supp. Mot. for Summ. J. ("Memo. in Supp.") at 2, ECF No. 71). DYS employees are either classified or unclassified civil servants, as the Department falls within Ohio's civil service. *See* Ohio Rev. Code § 124.11. Classified employees, if in a skilled position, must pass a civil service examination, *see id.* § 124.11(B)(1), and are typically employed in non-managerial positions. *Cf. id.* § 124.11(A) (noting that the unclassified service includes elected officials, members of boards and commissions, heads of departments, etc.). Classified civil servants enjoy "considerable job protection," including a statutory fallback right. *Campbell v. Wash. Cnty. Pub. Libr. Bd. of Trs.*, No. 04CA44, 2005 WL 1405789, at *2 (Ohio Ct. App. June 10, 2005).

including depositions, documents, electronically stored information, affidavits, or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Further, "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Defendant's Statement of Facts is supported by a number of declarations and depositions. Each declaration is signed and sworn under penalty of perjury. (*See, e.g.*, Declaration of Robin Gee at 4, ECF No. 71-1). Similarly, each deponent was first duly sworn before testifying. (*See, e.g.*, Deposition of Ryan Gies 6:1–3, ECF No. 69). As such, Defendant has fully complied with the requirements of Rule 56; Ames's request to strike is without basis and is therefore denied.

Unclassified employees, on the other hand, "serve at the pleasure of their appointing authority, and may be dismissed from their employment with or without cause." *McClain v. Nw. Cmty. Corr. Ctr. Jud. Corr. Bd.*, 440 F.3d 320, 330 (6th Cir. 2006) (quoting *Campbell*, 2005 WL 1405789, at *2 (internal citations omitted)). Unclassified positions include elected officials and department officials; many high-level managerial positions within state agencies are also unclassified. *See, e.g.*, Ohio Rev. Code § 124.11(A)(9). In the case of DYS, unclassified positions are appointed by the Director of the Department. *See id.* § 5139.01(B). The "fallback right" allows a classified employee who is appointed to an unclassified position to retain the right to 'fall back' to her most recently held classified position—that is, "to resume the position and status held . . . in the classified service immediately prior to [her] appointment to the position in the unclassified service"—if her unclassified position is revoked. Ohio Rev. Code § 124.11(D)(2).

Because of the unique nature of unclassified positions, the application and interview process for these positions at DYS differs greatly from the equivalent process for classified positions. For example, openings for unclassified positions are not required to be posted and do not require interviews. (*See* Declaration of Robin Gee ("Gee Decl.") ¶¶ 7–11, ECF No. 71-1). Additionally, whereas an applicant for a classified position within DYS must complete an application upon seeing an open position posting and an HR analyst must evaluate her qualifications before the applicant interviews for the position, the sequence of events for filling unclassified positions in DYS is less rigid; the application and even the qualifications verification may occur after an individual has already been interviewed or appointed. (*Id.* ¶¶ 11, 13–14).

2. Employment History with the Department

Ames first began working for DYS in 2004. (Deposition of Marlean Ames ("Ames Dep.") 37:14–16, ECF No. 62). She started as an Executive Secretary in the Akron Parole Region, before

moving to the IRJCF in the same role in 2005. (*Id.* 37:19–23). This position was in the classified civil service. (*See id.* 53:4–5, 19–22). In early 2009, Ames was appointed to a position with the specification of Administrative Assistant 3 and a working title of Community Facility Liaison,[2] which was part of the unclassified civil service. (*Id.* 54:6–14). The specification of the position later changed from Administrative Assistant 3 to Program Administrator 2, but with no alteration to Ames's responsibilities or pay grade. (*See id.* 72:3–20; Ames Dep. Ex. 7, ECF No. 62-1 at 10). As Community Facility Liaison, Ames did not supervise or direct other employees; her primary responsibilities included assisting her supervisor in evaluating, monitoring, and inspecting facilities and facility programs, and working with facilities to ensure compliance with the Ohio Administrative Code. (*See* Ex. 6, ECF No. 62-1 at 9). The role also required Ames to help facilities comply with the Prison Rape Elimination Act of 2003 ("PREA"), 34 U.S.C. § 30301–09. (*Id.*; *see also* Ames Dep. 74:18–21, ECF No. 62). The role was based out of the Department's central office in Columbus. (Ames Dep. 60:19–20, ECF No. 62).

In 2014, Ames was promoted to the position of PREA Administrator, located within the DYS Office of Quality and Improvement. (*Id.* 38:5–7). The position of PREA Administrator had a specification of Program Administrator 3 and was unclassified. (*See id.* 78:16–23). As PREA Administrator, Ames did not supervise any employees. (*See* Ex. D, ECF No. 71-4 at 16). She was initially supervised by Wendy Faulkner, who Ames identified as a "straight female," until 2017, when Ginine Trim, who Ames identified as a member of the "LBGTI" community, took over. She

[2] Employment positions are referred to by both "class specification" and by a "working title" or "position." The "specification" is, in effect, the grade level as set by the Ohio Department of Administrative Services for positions at all state agencies. (*See* Declaration of Kelly East ("East Decl.") ¶ 6, ECF No. 71-4). Each department or agency may have multiple "positions" for a given "class specification." A "position" or "working title" is specific to the actual role and is a more tailored label based on the requirements and responsibilities of the role. (*See id.* ¶ 7; Memo. in Supp. at 12 & n.6, ECF No. 71). A position is not classified (in terms of the classified/unclassified distinction) simply because it has a class specification.

had good, professional working relationships with both Faulkner and Trim. (*See* Ames Dep. 94:12–15, 95:2–6, 96:7–20, ECF No. 62; Deposition of Julie Walburn ("Walburn Dep.") 17:14–16, ECF No. 60). At the time, Trim was the Deputy Director of the Division of Professional Standards and Chief Inspector in the Office of Quality and Improvement. (*See* Deposition of Ginine Trim ("Trim Dep.") 25:6–12, ECF No. 64). Trim reported to Julie Walburn, the assistant director of DYS, who reported to Ryan Gies, the director of DYS appointed by Governor DeWine in 2019. (*Id.* 27:22–25; *see* Deposition of Ryan Gies ("Gies Dep.") 13:7–9, ECF No. 69). Ames had no personal knowledge about the sexual orientation of Walburn or Gies but assumed that Gies was straight. (Ames Dep. 109:1–5, 110:5–9, ECF No. 62).

In 2019, while Ames was still serving as PREA Administrator, the Office of Quality and Improvement announced the creation of a new position: the Bureau Chief of Quality Assurance and Improvement.[3] (*See id.* 115:23–2; Trim. Dep. 79:2–8, ECF No. 64). Ames applied and interviewed for the position but did not receive the promotion. (*See* Ames Dep. 116:19–117:3, ECF No. 62). Shortly afterward, on May 10, 2019, Robin Gee, from the Department's HR team, and Walburn informed Ames that she was being removed from her unclassified position as PREA Administrator and offered her the option of invoking her statutory fallback right. (*Id.* 97:4–17; Gee Decl. ¶¶ 22, 31, ECF No. 71-1). Ames eventually accepted the decision and returned to her most recently classified position as an Administrative Professional 4 (the new classification for Executive Secretary 1, the position Ames had last held in 2009 before she was appointed to the unclassified position of Administrative Assistant 3) at the Indian River facility. (Ames Dep. 99:22–100:15, ECF No. 62). She is currently still employed by the Department, after being

[3] The "class specification" for this position is Administrative Officer 3.

promoted to Human Services Program Administrator 2, an unclassified position. (*See* Memo. in Supp. at 7, ECF No. 71).

The two adverse employment events of 2019—first, the decision not to appoint Ames to the position of Bureau Chief of Quality Assurance and, second, the decision to revoke her unclassified appointment as PREA Administrator—are described more fully in the following sections.

3. Application for Appointment to Bureau Chief

Walburn envisioned the new position of Bureau Chief of Quality Assurance as a management role responsible for providing leadership and oversight of staff members in the Office of Quality and Improvement. (*See* East Decl. Ex. B, ECF No. 71-4 at 10). Management, workforce planning, and supervision were among the knowledge areas that the Department was looking for in applicants to the position. (*Id.*). Once Department leadership decided to create the position, Trim announced the position to the employees within the Office of Quality and Improvement via both email and an informal internal meeting and invited any interested team members to apply. (Trim Dep. 79:13–20, 87:21, 88:7–20, EF No. 64).

Three team members, including Ames, applied for the position and interviewed with Trim and Walburn in April 2019. (Ames Dep. 117:11–16, 119:7–9, ECF No. 62). In preparation for the interview, Ames conducted research and generated ideas about how to address deficiencies with the Department's facilities in a more holistic, multidisciplinary fashion. (*See id.* 119:9–19; 123:3–12). Ames felt confident coming out of the interview, especially as Walburn had expressed interest in an article on juvenile justice that Ames mentioned and Walburn and Trim had given Ames positive feedback at the end of the interview. (*See id.* 125:8–126:13). Overall, Ames felt like Walburn and Trim gave her a fair shot. (*Id.* 126:14–16). Walburn and Trim, however, had a

different impression about Ames's suitability for the role. In particular, Walburn expressed concern that Ames failed to lay out her "vision for what the job was meant to do or any vision for how to get the job done . . . [or] ideas on how to lay the foundation for this role." (Walburn Dep. 40:9–14, ECF No. 60; *see also* Trim Dep. 90:8–11, ECF No. 64) (suggesting that Ames "wasn't able to really express the vision" for the position). Walburn also worried that Ames lacked the requisite leadership skills for the position. (*See* Walburn Dep. 40:24–41:1, ECF No. 60).

Ames was not hired for the position. Walburn and Trim had not set a deadline for filling the Bureau Chief position and decided to prioritize finding the best fit over hiring someone promptly. (*See* Walburn Dep. 34:17–21, ECF No. 60). Six months later, Yolanda Frierson, who also worked in the Office of Quality and Improvement, reached out to Trim to ask about the status of the search process for a new Bureau Chief. Neither she nor her colleagues in the Office had heard any updates from Walburn or Trim since April about any of the three applicants and was unsure if the position was still open or even still existed. (*See* Deposition of Yolanda Frierson ("Frierson Dep.") 48:9–50:23, ECF No. 63). On December 10, 2019, Trim offered the Bureau Chief position to Frierson on a temporary basis, which she accepted. (*Id.* 75:25–76:5; *see id.* 74:6–75:8; 77:4–9). Frierson was then given a permanent appointment as Bureau Chief on January 23, 2020.[4] (Frierson Dep., Ex. 47, ECF No. 63-1 at 18).

Although Trim informed Frierson of the appointment, it was Walburn who had decided to select Frierson and recommended her appointment to Gies. (*See* Trim Dep. 91:20–92:2, 92:21–93:1, ECF No. 64) (noting that Trim did not have decisionmaking power and that the final decision for the Bureau Chief appointment rested with Walburn and Gies). Whereas Walburn had

[4] The effective date of the appointment was January 19, 2020. (*id.*).

expressed fears that Ames lacked vision and leadership, Walburn had worked well with Frierson in the past and felt that Frierson had good ideas on how to formulate the Bureau Chief position. (*See* Walburn Dep. 35:2–7, 20–23, 37:12–16, ECF No. 60). Importantly, Frierson had previously worked in management roles within the Department, where she had gained experience supervising other employees and completing performance evaluation—tasks that Ames had never handled. (*See* Declaration of Yolanda Frierson ("Frierson Decl.") ¶¶ 6, 8, ECF No. 71-5) (describing her work supervising staff as Unit Manager at SJCF and as Deputy Superintendent of Direct Services at CJCF). Frierson had joined DYS in 2006, two years after Ames; prior to the promotion to Bureau Chief, she had served as a Juvenile Corrections Officer, a Unit Manager, and a Human Services Program Administrator 2 at SJCF, before moving to CJFC as a Deputy Superintendent and then to the Department's Columbus office as Facility Resource Administrator and later Human Services Program Administrator 3 (with a brief return to CJCF as Deputy Superintendent of Program Services in between). (*Id.* ¶¶ 2, 5–11). Frierson identifies as female and gay. (Frierson Dep. 10:14–19, ECF No. 63).

4. Removal as PREA Administrator

The lack of vision identified by Walburn during Ames's interview for Bureau Chief ultimately resulted in her removal from her position as PREA Administrator as well. The Governor's Office had indicated to Gies, upon his appointment as Director, that addressing issues of sexual victimization within the juvenile corrections system was a priority concern. (*See* Gies Dep. 62:19–63:4, ECF No. 69). Gies quickly set about reorganizing the Department, combining the previously separate Chief Inspector's Office and the Office of Quality and Improvement into a single division. (Declaration of Ginine Trim ("Trim Decl.") ¶¶ 7–9, ECF No. 71-3). This

reorganization required moving personnel around: Trim, for example, moved from the Office of Technology to the new division. (*Id.* ¶ 8).

In his previous role as deputy director for the parole courts and community division of DYS, Gies had supervised Ames and had signed off on strong reviews of her performance each year between 2011 to 2013. (*See* Gies Dep. 28:2–30:22, ECF No. 69). But, apparently, Gies's impression of Ames as an employee took a downward turn between then and when he was appointed Director, based on feedback he had received from community partners that Ames was difficult to work with, abrasive, and not collaborative (though the feedback did not contain any criticisms of her work ethic or dedication). (*See id.* 31:22–32:6). And whereas the Governor's Office wanted Gies to revamp the Department's PREA approach, Gies recalls Walburn expressing concerns that Ames "did not have a vision and could not carry the culture of our facilities and preventing victimization from occurring." (*Id*. 63:19–23). Walburn was worried, specifically, that Ames would be unable to steer DYS towards more proactively complying with PREA standards. (Walburn Dep. 20:18–21:10). One sticking point was Ames's administration of PREA grant funds; Trim, Ames's direct supervisor, remembered Gies and Walburn being unhappy with the slow rollout of grants. (*See* Trim Dep. 36:22–37:8, 40:8–12, ECF No. 64). In fact, Trim noted in a performance review that Ames needed to improve her management of PREA grant funds (though she nevertheless rated Ames's overall performance as meeting expectations). (*Id.* 40:19–21).

Based on the sum of these concerns, Gies and Walburn made the decision to remove Ames from her classified position as PREA Administrator. (*See* Walburn Dep. 54:22–55:1, ECF No. 60). They discussed potential replacements and eventually settled on Alex Stojsavljevic. (Gies Dep. 73:19–20, 75:23–46:5, ECF No. 76). Gies does not recall the precise timeline of these discussions (including whether any such discussions occurred before Ames was notified of the

decision), but is adamant that he and Walburn agreed not to contact any potential candidates prior to removing Ames. (*Id.* 74:1975:4). Gies liked Stojsavljevic as a potential candidate because he had worked firsthand with Stojsavljevic, Stojsavljevic had experience with PREA while at the Indian River facility, and Gies felt that Stojsavljevic had demonstrated strong planning and communication skills. (*See id.* 79:5–14).

Ames claims that her demotion and replacement by Stojsavljevic was part of a long-running scheme to kick her out. She claims that Trim had previously suggested to her a number of times that she should consider resigning or returning to the Indian River facility to be closer to home. (*See* Ames Dep. 191:12–192:18, ECF No. 62). Trim does not recall any such conversations with Ames. (Trim Dep. 52:1–6, ECF No. 64). Ames also claims that Stojsavljevic had apparently been angling for Ames's position for some time, stating in front of their coworkers that he wanted the PREA Administrator position. (*See* Ames Dep. 179:2–5, ECF No. 62). Stojsavljevic acknowledges telling Ames, as well as other co-workers, but characterized it as an inside joke between the two of them. (*See* Deposition of Alex Stojsavljevic ("Stojsavljevic Dep.") 67:10–68:11, ECF No. 61). At the time, he and Ames were living together with roommates. (Ames Dep. 174:15–21, ECF No. 62). Ames considered him not only a friend, but also a mentee, though she was worried at times about Stojsavljevic's impatient attitude towards climbing the ranks within the Department and his claims that he could manipulate people to get what he wanted on the basis of being a gay man. (*See id.* 180:18–183:1). And Ames was concerned that these claims might have been true, because she had heard that Stojsavljevic had been promoted to PREA Compliance Manager at IRJCF in October 2017 without even being eligible for the promotion. The superintendent there, Chris Freeman, apparently devised a work-around to the rule that employees

on probationary status, like Stojsavljevic, could not be promoted; he asked Stojsavljevic to resign from his job and then hired him in the new role the next day.[5] (*See id.* 188:10–190:1).

Ames also claims that Stojsavljevic's former supervisors, Stephanie Groff and Jodi Slagle, had reassured him that they would help him with his goal of becoming PREA Administrator. (*See id.* 175:8–20; *see also* Stojsavljevic Dep. 52:10–24, ECF No. 61). Further, Ames claims that Slagle, who was friendly and familiar with Gies, went to Gies about Stojsavljevic's desire for the job. (Ames Dep. 175:21–176:1, ECF No. 62). This claim is not corroborated by other deponents; Stojsavljevic, for example, remembers Slagle and Groff telling him, in response to his interest in the PREA Administrator position, that Ames "was not going to move out of that position" but that they would "help [him] get more PREA experienced or activities that [he] wanted to do surrounding PREA." (Stojsavljevic Dep. 93:23–94:14, ECF No. 61). Gies makes no mention in his deposition of any such conversation with Slagle, or, in fact, any awareness of Stojsavljevic's interest in the job. (*See* Gies Dep. 85:7–14, ECF No. 69).

Gies and Walburn finalized the decision to appoint Stojsavljevic as the new PREA Administrator on May 26, 2019. (*See id.* 91:22–92:2). Gies had been told by others at the Department that Stojsavljevic was gay some years prior, but did not have any personal knowledge to that effect. (*See id.* 90:17–91:17). Trim also knew that Stojsavljevic was gay, though she did not have any role in the decision to appoint him; she was informed of the decision to promote Stojsavljevic by Walburn after the decision was made. (Trim Dep. 70:11–71:3, ECF No. 64).

B. Procedural Background

[5] Ames does not have first-hand knowledge of this event. (*Id.* 189:22–190:1).

Plaintiff filed a charge of discrimination against Defendant Ohio Department of Youth Services with the Ohio Civil Rights Commission and the U.S. Equal Employment Opportunity Commission ("EEOC") on August 21, 2019. (*See* Pl.'s Ex. 3, ECF No. 1-3). The EEOC reached a determination of reasonable cause and issued a 90-day right to sue letter on September 8, 2020. (*Id.*). Subsequently, on November 18, 2020, Ames filed her initial Complaint (ECF No. 1) in this Court, alleging eight causes of action under federal and state law. Ames later amended her complaint. (*See* Am. Compl., ECF No. 28). In the Amended Complaint, Ames again asserted eight claims: (1) gender and sexual orientation discrimination pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17; (2) hostile work environment based on sexual orientation and age under Title VII; (3) retaliation under Title VII; (4) age discrimination under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34; (5) violations of due process rights under the Fourteenth Amendment; (6) age discrimination under Ohio Rev. Code ch. 4112;[6] (7) gender discrimination under Ohio Rev. Code ch. 4112; and (8) hostile work environment under Ohio Rev. Code ch. 4112.

On June 23, 2021, Defendant DYS filed its Motion for Judgment on the Pleadings (ECF No. 31). The Court dismissed Counts 2–7, finding that: (1) the Plaintiff had failed to state a claim with regards to her Title VII hostile work environment, Title VII retaliation, and Fourteenth Amendment due process claims (Counts 2, 3, and 5, respectively); (2) the Court lacked subject matter jurisdiction over Plaintiff's ADEA claim (Count 4); and (3) Plaintiff's state law claims (Counts 6, 7, and 8) were barred by the State's sovereign immunity under the Eleventh Amendment. (*See generally* Op. & Order, ECF No. 50). Count 4 was dismissed with prejudice,

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[6] Plaintiff did not specify a statute within Chapter 4112 for Counts 6–8.

and Counts 2, 3, 5, 6, 7, and 8 dismissed without prejudice. The parties subsequently engaged in extensive discovery. On June 10, 2022, Defendant DYS filed its Motion for Summary Judgment (ECF No. 71) as to the remaining Title VII sex-based discrimination claim. That motion is now ripe for this Court's review.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(a) states that summary judgment is appropriate "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." The Court must view the evidence in the light most favorable to the non-moving party, and draw all reasonable inferences in the non-movant's favor. *S.E.C. v. Sierra Brokerage Servs., Inc.*, 712 F.3d 321, 327 (6th Cir. 2013) (citing *Tysinger v. Police Dep't of City of Zanesville*, 463 F.3d 569, 572 (6th Cir. 2006)). This Court then asks "whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden,* 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 251–52 (1986)). Summary judgment is inappropriate, however, "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248. Evidence that is "merely colorable" or "not significantly probative" is not enough to defeat a motion for summary judgment, *id.* at 249–50, nor is "[t]he mere existence of a scintilla of evidence to support [the non-moving party's] position" sufficient. *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995); *see also Anderson*, 477 U.S. at 251.

The initial burden rests upon the movant to present the Court with law and argument in support of its motion, and to identify the relevant portions of "'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes

demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56). If this initial burden is satisfied, the burden then shifts to the nonmoving party to set forth specific facts showing that there remains a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *see also Cox v. Ky. Dep't of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995) (noting that after the burden shifts, the nonmovant must "produce evidence that results in a conflict of material fact to be resolved by a jury").

III. LAW & ANALYSIS

Allegations of discrimination in the employment context may be established by the introduction of either direct evidence of discrimination or by providing circumstantial evidence that supports an inference of discrimination. *See Kline v. Tenn. Valley Auth.*, 128 F.3d 337, 348 (6th Cir. 1997) (citing *Talley v. Bravo Pitino Rest., Ltd.*, 61 F.3d 1241, 1248 (6th Cir. 1995)). Direct evidence of discrimination, such as "'eyewitness' testimony as to the employer's mental processes," *U.S. Postal Serv. Bd. of Governors v. Aiken*, 460 U.S. 711, 716 (1983), is rarely available, *see Kline*, 128 F.3d at 348, and Ames has acknowledged that her "evidence of discrimination is entirely circumstantial" in this case. (*See* Pl.'s Resp. at 5, ECF No. 72).

In assessing allegations of discrimination based on circumstantial evidence, courts rely on the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973). Under that framework, the plaintiff alleging discrimination bears the initial burden of establishing a *prima facie* case of retaliation, by demonstrating that: "(1) he or she was a member of a protected class; (2) he or she suffered an adverse employment action; (3) he or she was qualified for the position; and (4) he or she was replaced by someone outside the protected class or was treated differently than similarly-situated, non-protected employees." *Briggs v. Univ. of Cincinnati*, 11 F.4th 498, 508 (6th Cir. 2021) (quoting *Wright v. Murray Guard, Inc.*, 455 F.3d

702, 707 (6th Cir. 2006) (internal citations omitted)). Where the plaintiff is a member of a majority group, however, she bears an additional "burden of demonstrating that [s]he was intentionally discriminated against 'despite [her] majority status.'" *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985) (internal citations omitted). As such, a plaintiff alleging reverse discrimination must show that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority" to establish the first prong of the *prima facie* case. *Id.* (quoting *Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981)); *see also Romans v. Mich. Dep't of Hum. Servs.*, 668 F.3d 826, 837 (6th Cir. 2012) (internal citations omitted).

If a plaintiff is able to demonstrate a *prima facie* case of employment discrimination, the burden shifts to the defendant to provide a "legitimate, nondiscriminatory reason" for its actions. *McDonnell Douglas*, 411 U.S. at 802. This is satisfied if the employer "explains what [it] has done or produces evidence of legitimate nondiscriminatory reasons." *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 256 (1981). And, if the employer is able to satisfy its burden, "the burden of production shifts back to [Plaintiff] to demonstrate that [the employer's] proffered reason was a mere pretext for discrimination." *Kenney v. Aspen Techs., Inc.*, 965 F.3d 443, 448 (6th Cir. 2020) (citing *Abbott v. Crown Motors Co.*, 348 F.3d 537, 542 (6th Cir. 2003)). There are three ways in which a plaintiff can demonstrate pretext: "(1) that the proffered reasons had no basis in law, (2) that the proffered reasons did not actually motivate the employer's actions, or (3) that they were insufficient to motivate the employer's actions." *Romans*, 668 F.3d at 839 (quoting *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 (6th Cir. 2009)). The essential question for courts evaluating claims of pretext is "whether the employer made a reasonably informed and considered decision before taking an adverse employment decision." *Burdine*, 450 U.S. at 256.

Having set forth the analytical framework for employment discrimination claims pursuant to Title VII, the Court now turns to the allegations made by Ames in this case. Ames alleges two instances of discrimination: first, the failure to promote her to the position of Bureau Chief; and second, the decision to revoke her appointment as PREA Administrator. (*See* Pl.'s Resp. at 4, ECF No. 72). Ames alleges that both instances constitute sex-based discrimination,[7] because she is a woman and is heterosexual. *Cf. Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1743 (2020) (affirming that discrimination on account of sexual orientation or gender identity is "in part because of sex").

A. Failure to Promote

As set forth previously, Ames applied for a promotion to the position of Bureau Chief of Quality Assurance and Improvement in April 2019, but did not receive the promotion. That position was eventually given to Yolanda Frierson, a gay woman, on a full-time basis in January 2020. Ames alleges that the decision to choose Frierson over her demonstrates sex-based reverse discrimination in violation of Title VII—in other words, that she was denied for the position because she is heterosexual.[8]

Accordingly, this Court evaluates Ames's failure-to-promote claim under the modified *McDonnell Douglas* burden-shifting framework set forth above, under which Ames must point to "background circumstances" to establish the first prong of her *prima facie* case. Examples of "background circumstances" sufficient to demonstrate that an employer has discriminated against

[7] Ames refers to both bases of discrimination as "gender-based." (*See, e.g.*, Pl.'s Resp. at 4, ECF No. 72). Title VII bars discrimination on the basis of an individual's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. Title VII does not, on the other hand, mention gender-based discrimination. Similarly, *Bostock*, which Ames cites for the proposition that a gender-based discrimination claim may be based on sexual orientation, actually discussed sex-based discrimination. *Bostock*, 140 S. Ct. at 1737 (noting, in explaining the holding, that "[s]ex plays a necessary and undisguisable role in the decision [to fire an individual for being homosexual or transgender], exactly what Title VII forbids"). Accordingly, the Court refers to Ames's claims as rooted in allegations of sex-based discrimination, not gender-based discrimination, throughout this Opinion & Order.

[8] In contrast to Ames's claim regarding the revocation of her appointment as PREA administrator, this incident does not state a claim for discrimination against Ames as a woman because Frierson is also a woman.

a majority group include statistical analysis of the employer's unlawful consideration of protected characteristics in past employment decisions, *see Sutherland v. Mich. Dep't of Treasury*, 344 F.3d 603, 614 (6th Cir. 2003), the fact that a minority employer replaced the plaintiff with another employee of the same minority group, *see Zambetti v. Cuyahoga Cmty. Coll.*, 314 F.3d 249, 257 (6th Cir. 2002), and evidence of "organizational preference" for hiring members of a minority group. *Nelson v. Ball Corp.*, 656 F. App'x 131, 136–37 (6th Cir. 2016) (quoting *Sampson v. Sec'y of Transp.*, 182 F.3d 918, 1999 WL 455399, at *1 (6th Cir. June 23, 1999) (unpublished)); *see also Romans*, 668 F.3d at 837 (noting that evidence of past hiring policies favoring minority applicants may demonstrate the necessary "background circumstances" of reverse discrimination (internal citations omitted)).

Ames is unable to meet this threshold requirement. She has not "present[ed] significant evidence in the form of statistical data tending to show in the years prior to the employment decisions at issue, the [] Department considered [sexual orientation] in making employment decisions." *Sutherland*, 344 F.3d at 615. She has not "submitted a large number of [Department] policies and procedures which reflect an organizational preference for establishing a diverse group of employees," or in fact any such Department policies or procedures to that affect. *Sampson*, 1999 WL 455399, at *1. And, perhaps most importantly, she has not demonstrated that her adverse employment action was authorized by or involved any individuals who were also members of the same minority group as Frierson (that is, the LGBTI community);[9] in fact, the undisputed evidence in this case is that Walburn and Gies, both of whom Ames believes are heterosexual, made the decision not to promote her and to select Frierson instead. *See Nelson*, 656 F. App'x at 137 ("Most

[9] The Court adopts Ames's use of the label "LGBTI," which stands for "lesbian, gay, bisexual, transgender, and intersex" and is the term used by the Officer of the United Nations High Commissioner of Human Rights (as compared to the terms "LGBTQ" or "LGBTQ+," which are more commonly used in the United States).

fatal to Nelson's prima facie case [of reverse race discrimination] is the undisputed fact that all of the employees involved in the investigation and subsequent termination of Nelson were Caucasian."). Moreover, neither Gies nor Walburn had personal knowledge about Frierson's or Ames's sexual orientation.

The only support Ames can provide for a finding of "background circumstances" is that she has allegedly suffered two adverse employment decisions on account of her sex—which, Ames argues, "constitutes a pattern." (Pl.'s Resp. at 5, ECF No. 72). But two data points are not enough to establish a pattern. *Cf.* IAN FLEMING, GOLDFINGER (1959) ("Mr. Bond, they have a saying in Chicago: 'Once is happenstance. Twice is coincidence. The third time, it's enemy action.'"). Compare, for example, the statistical evidence presented in *Sutherland*: there, plaintiffs provided a statistical analysis of the percentage of auditor positions at the employer held by different demographics across a twenty-year span. *Sutherland*, 344 F.3d at 615–16. In *Zambetti*, plaintiff's allegations included evidence of the employer's hiring practices over a six (6) year span. *Zambetti*, 314 F.3d at 256; *see also id.* at 257 (noting the difficulty of drawing inferences from hiring data without knowing the "composition of the applicant pools for those positions"). These cases demonstrate that extensive, rigorous evidence is required to establish a pattern for the purposes of "background circumstances," given the unusual form of discrimination at issue. Moreover, the two incidents that comprise the "pattern" alleged by Ames are her own (as yet unproven) allegations in the case *sub judice*. *See id.* at 256 (describing evidence produced by plaintiff of past employment decisions relating to third parties); *cf. Brooks v. Am. Broad. Cos., Inc.*, 999 F.2d 167, 172 (6th Cir. 1993) ("[T]he district court was not required to accept unsupported, self-serving testimony as evidence sufficient to create a jury question." (*citing Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373, 1383 (5th Cir. 1979)). Therefore, the Court concludes that

Ames's own allegations of two discriminatory adverse events are, on their own, clearly insufficient to establish the "background circumstances" necessary for a plaintiff to make a *prima facie* case of reverse discrimination.

Where a plaintiff is unable to satisfy the first prong of the *prima facie* case of employment discrimination, the Court is not required to reach the second and third steps of the *McDonnell Douglas* burden-shifting framework. *Zambetti*, 314 F.3d at 257 (citing *Murray*, 770 F.2d at 68; *Jamison v. Storer*, 830 F.2d 194, 1987 WL 44901, at *3 (6th Cir. Sept. 30, 1987) (unpublished)). As Ames has failed to demonstrate "background circumstances support[ing] the suspicion that [DYS] is that unusual employer who discriminates against the majority," *Murray*, 770 F.2d at 68 (quoting *Parker*, 652 F.2d at 1017), the Court finds that she has failed to satisfy her burden of establishing a *prima facie* case of sex-based employment discrimination for her failure-to-promote claim. Accordingly, the Court **GRANTS** Defendant's Motion for Summary Judgment (ECF No. 71) as to the failure to promote claim.

B. Revocation from PREA Administrator Position

The decision to demote Ames from the PREA Administrator position presents a more complicated analysis, as she was replaced with Stojsavljevic, a gay man; this claim, in other words, presents allegations of discrimination on the basis that Ames is heterosexual and also on the basis that Ames is a woman.[10] The Court addresses each alleged basis for discrimination in turn, starting with the allegation of discrimination based on sexual orientation.

As noted previously with respect to Ames's failure to protect claim, a plaintiff alleging reverse discrimination in the employment context must establish the existence of "background

[10] DYS phrases this as a "revocation" of Ames's unclassified status; as the decision effectively demoted Ames, the Court variously refers to the May 2019 decision as a revocation or a demotion.

circumstances" in order to carry her burden of making out a *prima facie* case of discrimination. Ames alleges the same form of reverse discrimination here as she did regarding the decision not to promote her to Bureau Chief: that is, Ames claims that she was replaced as PREA Administrator on account of being heterosexual. But the same deficiencies that plagued Ames's failure to promote claim crop up here too. She has neglected to provide any statistical evidence of past reverse discrimination, any indication of policies or procedures indicating organizational preferences for minority applicants, or any suggestion that the decisionmakers behind her demotion (and the subsequent promotion of Stojsavljevic) were members of the LGBTI community. *See supra* Part III.A. Without such evidence, the Court concluded that Ames could not establish a *prima facie* case of discrimination based on sexual orientation for her failure to protect claim; similarly, the Court concludes that she is also unable to establish a *prima facie* case of reverse discrimination based on sexual orientation for her demotion claim.

The Court next considers Ames's claim that she was demoted and replaced by Stojsavljevic because she is a woman. The Department acknowledges that Ames can carry her burden of establishing a *prima facie* claim with respect to this issue. (*See* Memo. in Supp. at 29, ECF No. 71). It is undisputed, after all, that Ames is a member of a protected class (as a female), was qualified for her role as PREA Administrator, was terminated (i.e., an adverse employment action), and was replaced by a male employee. *See Briggs*, 11 F.4th at 508. The Department suggests, however, that the decision to revoke Ames's position as PREA Administrator was based on legitimate, nondiscriminatory business reasons. (Memo. in Supp. at 29–30, ECF No. 71). These reasons include Gies' desire to revamp the Department's PREA strategy into a more proactive approach, based in part on the Governor's concern with sexual victimization in juvenile correctional facilities, and Walburn's concerns that Ames did not have the vision, ability, or

leadership skills to carry out Gies' vision. (*See id.*). The reasons also included the negative feedback that Gies had received about Ames being abrasive and a difficult person with whom to work. *See Thompson v. Bd. of Educ.*, No. 3:12-cv-00327, 2013 WL 6001626, at *7 (S.D. Ohio Nov. 12, 2013) (finding that the employer's determination that plaintiff employee would not be a good fit because he was "arrogant, a know-it-all, and an overly-assertive person" was a "honest, legitimate, and non-discriminatory" rationale). Gies explicitly noted in his testimony that the question of who would replace Ames in the PREA Administrator role was not a consideration in the decision to remove Ames and, in fact, was not discussed until after the removal decision had already been made.

As to the final step in the burden-shifting framework, the Department argues that Ames is unable to demonstrate that the proffered rationale has no basis in fact, did not actually motivate Gies and Walburn's decision, or was insufficient to motivate Gies and Walburn — in short, that Ames is unable to show pretext. (*See* Memo. in Supp. at 31–36, ECF No. 71). First, DYS suggests that Gies and Walburn both believed that Ames lacked the ability to revamp the PREA program and administer funds in a more proactive manner. *See Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998) (noting that "the employer must be able to establish its reasonable reliance on the particularized facts before it at the time the decision was made"). The testimony provided by DYS leadership supports the inference that they made a "reasonably informed and considered decision" to demote Ames: Gies and Walburn both testified about the Department's vision for the role and the specific issues they had with Ames's prior work performance (including her communication style and slow deployment of PREA grant funds). Second, DYS argues that these concerns truly did motivate the decision to remove Ames. The positive performance reviews Gies had written about Ames in 2011–13 do not demonstrate that the proffered explanation is a post-hoc

rationalization, according to DYS, because Gies later received negative feedback about Ames that undermined his earlier impression of her work. (*See* Memo. in Supp. at 32, ECF No. 72). And it certainly is true that impressions and attitudes regarding an employee's work product and skills can shift over the course of six (6) years.

Nor is the fact that Stojsavljevic told other employees and his former supervisors that he wanted the PREA Administrator job enough to create a genuine issue about whether the valid business concerns set out by Gies and Walburn actually motivated their decision to remove Ames. There is little indication that they were aware of the comments or of Stojsavljevic's interest. Ames suggests that Sagle, who was friendly with Gies, went to Gies to inform him of Stojsavljevic's desire for the PREA Administrator job, but Stojsavljevic claims that Sagle was not receptive towards his expression of interest, told him to look elsewhere for a new job, and encouraged him to get more PREA experience; Gies makes no mention of a discussion with Sagle (or with Groff) about Stojsavljevic as a candidate for the PREA Administrator position, and neither Gies nor Walburn mentioned any awareness of Stojsavljevic's comments leading up to their decision to promote him to PREA Administrator. In other words, there is no genuine dispute that the record lacks evidence that Stojsavljevic's comments had any influence on Gies and Walburn—or that his interest in the job was the real motivator behind their decision to revoke Ames's unclassified appointment.

DYS asserts that the proffered reasoning was sufficient to motivate the demotion decision, by pointing out that Ames has failed to adduce evidence demonstrating that intentional discrimination was the actual motivating factor. (*See id.* at 33–36). Finally, DYS argues that Ames has failed to put forward "evidence that employees outside the protected class engaged in 'substantially identical conduct' and fared better than [she] did." *Roseman v. Int'l Union, United*

Auto., Aerospace and Agric. Implement Workers of Am., No. 20-2151, 2021 WL 4931959, at *4 (6th Cir. July 14, 2021) (quoting *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994)). Ames testified as to seven individuals that she believes were treated more favorably than her.[11] (*See* Memo. in Supp. at 34, ECF No. 71). But Ames has not provided evidence of how they have engaged in substantially identical conduct or have fared better than she did; in fact, as DYS points out, Ames is unable to establish similarities with the individuals or explain how they have been treated more favorably.[12]

The same is true of Ames's attempts to demonstrate pretext. She baldly asserts that the nondiscriminatory rationale proffered by DYS is overly vague, is "precisely the sort of factually baseless justification that employers have been using for years to justify their own bigotry and discrimination," and "is unworthy of credence," but does not provide any evidence that that is the case. (Pl.'s Resp. at 9, ECF No. 72) (quoting *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 143 (2000) (internal citations omitted)). Under the *McDonnell Douglas* burden-shifting framework, once an employer has provided a nondiscriminatory reason, the burden of production shifts back to the plaintiff, to show that the proffered reason is pretextual — that it is without basis in fact, did not actually motivate the decision, or was insufficient to motivate the decision. *See Burdine*, 450 U.S. at 256–57 (noting that a Title VII defendant need not "persuad[e] the court that

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[11] She mentions only three individuals, Frierson, Stojsavljevic, and Trim, in her opposition to DYS's motion for summary judgment. (Pl.'s Resp. at 9, ECF No. 72).

[12] The seven individuals were: Ginine Trim, Yolonda Frierson, Nathan Lawson, Chris Freeman, Jeff Spears, Kenya Brown, and Michael Garret. In the first instance, Ames did not work in the same divisions or under the same supervisors at DYS as Kenya Brown, Nathan Lawson, or Chris Freeman. (Memo. in Supp. at 35–36, ECF No. 71). She cannot show that Michael Garret received more favorable treatment than her. (*See id.* at 35). Trim was her supervisor and was not similarly situated. Her allegations about Frierson have been discussed already. And finally, she alleges that Spears received a cake and party by the gay supervisors on his 30th work anniversary, whereas Ames did not receive cake or party for the same occasion, but is unable to name any of the supervisors who allegedly threw the party. (*See* Ames Dep. 202:11–14, ECF No. 62). DYS suggests instead that the party may actually have been to celebrate Spears' return to work after some time away. (*See id.* at 203:15–24).

it had convincing objective reasons for preferring the chosen applicant above the plaintiff" but must only "produce evidence of legitimate nondiscriminatory reasons" (quoting *Bd. of Trs. of Keene State Coll. v. Sweeney*, 439 U.S. 24, 29 (1978) (Stevens, J., dissenting))).

Ames has not done so here: she points to no facts in the record tending to suggest that the explanation is without a factual basis, did not motivate the decision, or was insufficient to do so; instead, she suggests only that "the other evidence of discrimination—see the promotions of Frierson, Stojsavljevic, and Trim" — demonstrate that the proffered rationale is not credible. (Pl.'s Resp. at 9, ECF No. 72). But the promotions of Frierson and Stojsavljevic are the *alleged* instances of discrimination made in this case; they do not constitute stand-alone evidence of discrimination. *See also Manzer*, 29 F.3d at 1084 (holding that a "plaintiff may not rely simply upon his prima facie evidence but must, instead, introduce additional evidence of age discrimination" to rebut a proffered nondiscriminatory reason for the adverse employment action). As to the promotion of Trim, Ames has provided no proof that that employment decision was rooted in bias or discrimination, nor is it alleged in Ames's Complaint, Amended Complaint, or deposition testimony that Trim was promoted because she is gay. (*See generally* Compl., ECF No. 1; Am. Compl., ECF No. 28). To the contrary, Ames's assertion in her memo contra that Trim's promotion is "evidence of discrimination" is entirely unsupported by any citations to the record, detailed factual allegations, or further explanation. Conclusory statements without a factual basis are insufficient to create a genuine issue and withstand a motion for summary judgment.

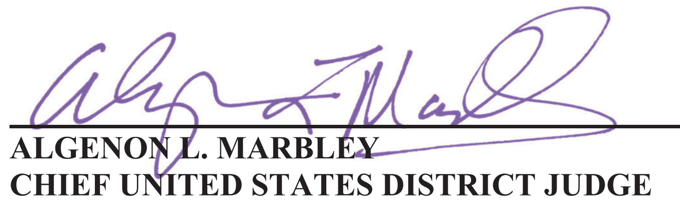
In short, Ames has failed to provide "background circumstances" sufficient to establish a *prima facie* case of sexual orientation-based discrimination; she has also failed to provide evidence creating a genuine dispute of material fact as to whether Defendant DYS's proffered legitimate, nondiscriminatory reasons for revoking her appointment as PREA Administrator was pretext.

Accordingly, the Court **GRANTS** Defendant's Motion for Summary Judgment (ECF No. 71) on Ames's discrimination claim about her demotion.

IV. CONCLUSION

For the reasons stated more fully above, this Court **GRANTS** Defendant's Motion for Summary Judgment (ECF No. 71). Plaintiff's Title VII sex-based discrimination claims are **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.



ALGENON L. MARBLEY
CHIEF UNITED STATES DISTRICT JUDGE

DATE: March 16, 2023

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MARLEAN A. AMES,	:	
	:	**Case No. 2:20-cv-05935**
Plaintiff,	:	
	:	**CHIEF JUDGE ALGENON L. MARBLEY**
v.	:	
	:	**Magistrate Judge Deavers**
STATE OF OHIO DEPARTMENT OF YOUTH SERVICES,	:	
	:	
	:	
	:	
Defendant.	:	

OPINION & ORDER

This matter comes before the Court on Defendant's Motion for Judgment on the Pleadings. (ECF No. 31). For the following reasons, this Court **GRANTS** Defendant's Motion for Judgment on the Pleadings. (*Id.*).

I. BACKGROUND

A. Facts

This case arises from the alleged discrimination experienced by Marlean Ames in her employment. (ECF No. 28). Plaintiff alleges that such discrimination took place on the basis of her gender, sexual preference, and age. (*Id.* at 1). Ames is a female who identifies as heterosexual and is over forty years old. (*Id.* at 2). Ames has worked for the State of Ohio's Department of Youth Services ("DYS") since 2004. (*Id.*). DYS is a state agency that oversees the rehabilitation and confinement of juveniles in Ohio. (*Id.*). DYS hired Ames initially as an Executive Secretary within the Parole Division. (*Id.*). After starting her tenure with DYS in Akron, Ames soon transferred to the Indian River Juvenile Corrections Facility ("IRJCF") in Massillon. (*Id.* at 3). There, she worked as an Executive Secretary for approximately four years. (*Id.*).

In 2009, DYS offered Ames a new assignment as an "Administrative Assistant 2 or Program Administrator 2" in its Central Office in Columbus. (*Id.*). There, Ames worked in this role just over five years. (*Id.*). After receiving positive reviews and salary raises, DYS promoted Ames to Prison Rape Elimination Act Administrator ("PREAA") in 2014. (*Id.*). In May of 2017, Ginine Trim became Ames's supervisor. (*Id.*). Trim is a female who identifies as a member of the Lesbian, Gay, Bisexual, Transgender, Intersex, and Questioning ("LGBTIQ") community. (*Id.*). Trim made Ames aware that she was a member of this community. (*Id.*).

Meanwhile, DYS hired Alexander Stoksavljevic at IRJCF as a social worker. (*Id.*). Stoksavljevic is a male who identifies as a member of the LGBTIQ community and was twenty-five in May of 2017. (*Id.*). In October of the same year, DYS promoted Stoksavljevic to Client Advocate/PREA Compliance Manager ("PCM"). (*Id.* at 4). Notably, because Stoksavljevic was still on probationary status, he was not eligible for this promotion. (*Id.*). To circumvent this obstacle, the Superintendent of IRJCF suggested that Stoksavljevic resign his current position so that he may be hired as a PCM the following day. (*Id.*). According to Plaintiff, this conduct violated the agency's hiring processes. (*Id.*). Stoksavljevic then began pushing for Plaintiff's position. (*Id.*). He told Trim—in front of Plaintiff—that Plaintiff should retire. (*Id.*).

On May 6, 2019, Trim paid Ames a visit at her desk. (*Id.*). After congratulating Ames for 30 years of public service, Trim suggested that Ames retire. (*Id.*). Alternatively, Trim suggested, Ames should return to the Akron facility where she started her career with DYS. (*Id.*). Indeed, Trim encouraged Plaintiff to apply for the now open position Stojsavljevic just left; this would result, however, in a significant pay reduction. (*Id.*). Plaintiff rebuffed both suggestions. (*Id.*).

Four days later, Plaintiff was required to report to Director Ryan Gies's conference room. (*Id.* at 4-5). There, HR Bureau Chief Robin Gee and Assistant Director of DYS Julie Walburn

waited for Ames. (*Id.* at 5). Walburn told Ames she was being demoted and transferred and that she needed to sign an agreement reflecting such or risk termination. (*Id.*). In response, Ames fled the room crying. (*Id.*). Gee and Trim followed Ames and renewed Walburn's request. (*Id.*). Plaintiff relented, signed the paper agreeing to a demotion and transfer, and involuntarily vacated the premises. (*Id.*). Shortly thereafter, DYS required Plaintiff to report for her new position at IRJCF. (*Id.*). On May 13, 2019, DYS hired Stoksavljevic as a PREA—the role Plaintiff held immediately prior. (*Id.*). Further, DYS hired Stoksavljevic despite being neither qualified nor having formally applied. (*Id.*). Further, Plaintiff alleges that this was not the only instance of impropriety she faced. (*See id.* at 6).

In April 2019, Ames applied and interviewed for the role of Bureau Chief of the Quality Assurance Department. (*Id.*). Despite being qualified and fulfilling the application requirements, DYS declined to hire Ames, opting instead for Yolanda Frierson. (*Id.*). Frierson, a member of the LGBTIQ community, is under forty years old. (*Id.*). Despite neither applying for the position when it was originally posted nor being qualified, DYS selected Frierson instead of Ames. (*Id.*).

Finally, Plaintiff alleges that DYS behaved improperly in other ways. Unlike when Plaintiff received her 30-year service certificate, Jeffrey Spears—a male who identifies as a member of the LGBTIQ community—was thrown a party replete with cake and published announcements by Trim "and other gay supervisors." (*Id.*). Plaintiff maintains that the all of the above events were motivative by Plaintiff's heterosexual preference, gender and age. (*Id.*).

B. Procedural

On April 20, 2020 the United States Equal Employment Opportunity Commission ("EEOC") reached a determination of probable cause and issued a 90-day right to sue letter on September 9, 2020. (ECF No. 1-2). On November 18, 2020, Plaintiff filed her initial Complaint

against DYS. (ECF No. 1). Plaintiff alleged eight causes of action under federal and state law arising from her employment with DYS. (*Id.*). Defendant Answered (ECF No. 4), filed its first Motion for Judgment on the Pleadings (ECF No. 11), before Plaintiff ultimately filed her Amended Complaint on May 21, 2021. (ECF No. 28).

In the Amended Complaint, Plaintiff also asserted eight claims. (*Id.*). These causes of action include gender and sexual orientation discrimination under 42 U.S.C. § 2000e, et seq. (Title VII) (Count 1); Hostile work environment based on sexual orientation and age under Title VII (Count 2); Retaliation under Title VII (Count 3); Age discrimination under 29 U.S.C. § 623, et seq. (ADEA) (Count 4); Fourteenth Amendment due process rights under 42 U.S.C. § 1983 (Count 5); Age discrimination under Ohio Rev. Code Chapter 4112 (Count 6); Gender discrimination under Ohio Rev. Code Chapter 4112 (Count 7); and Hostile work environment under Ohio Rev. Code Chapter 4112 (Count 8). Defendant timely filed its Answer. (ECF No. 29).

On June 23, 2021, Defendant filed its Motion for Judgment on the Pleadings. (ECF No. 31). Plaintiff timely filed her Response (ECF No. 36), and Defendant timely filed its Reply (ECF No. 37). This motion is now ripe for review.

II. STANDARD OF REVIEW

When a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is based on the argument that the complaint fails to state a claim upon which relief may be granted, the Court employs the same legal standard as a Rule 12(b)(6) motion. *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 11 (6th Cir. 1987) ("Where the Rule 12(b)(6) defense is raised by a Rule 12(c) motion for judgment on the pleadings, we must apply the standard for a Rule 12(b)(6) motion"). The Court will grant the Rule 12(c) motion "when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 582 (6th Cir. 2007) (internal quotation marks omitted). The Court

must construe "all well-pleaded material allegations of the pleadings of the opposing party . . . as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *Id.* at 581 (internal quotation marks omitted). The Court is not required, however, to accept as true mere legal conclusions unsupported by factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

III. LAW & ANALYSIS

Defendant moves for judgment on the pleadings on two bases: (1) the Court lacks subject-matter jurisdiction as to Counts 4 (ADEA), 6, 7, and 8 (the state law claims); and (2) Plaintiff fails to state a claim with regard to Counts 2 (Federal Hostile Work environment), 3 (Retaliation under Title VII), and 5 (42 U.S.C. § 1983). The Court will address each argument in turn beginning with Defendant's argument against subject-matter jurisdiction.

A. Subject-Matter Jurisdiction

1. Count 4: ADEA

Defendants argue that the Court lacks subject matter jurisdiction over Plaintiff's claim brought under the Age Discrimination in Employment Act (ADEA). (ECF No. 31 at 3). Relying on the Supreme Court's decision in *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 92 (2000), Defendants contend that Congress has not validly abrogated state immunity under the ADEA. (*Id.*). Additionally, Defendant, relying on *Cameron v. Ohio*, No. 2:06-CV-871, 2007 U.S. Dist. LEXIS 76774, at *5-6 (S.D. Ohio Oct. 16, 2007), argues that the State of Ohio has not waived its immunity. (*Id.*). Accordingly, argues Defendant, this Court lacks subject matter jurisdiction over this claim. (*Id.*). Plaintiff begrudgingly concedes this argument. (ECF No. 36 at 2). Accordingly, Defendant's Motion on this basis is **GRANTED**.

2. Counts 6, 7, 8: State Law Claims

Defendant also argues that Counts 6, 7 and 8—all alleged violations of Ohio Revised Code section 4112—cannot be prosecuted in federal court. (ECF No. 31 at 4). Defendant, relying on *Dendinger v. Ohio*, contends that the "Eleventh Amendment deprives federal courts of jurisdiction" regarding actions brought pursuant to Ohio revised code chapter 4112. (*Id.*) (citing 207 F. App'x 521, 529 (6th Cir. 2006)). Moreover, according to Defendant, because the State of Ohio did not consent to being sued in federal court under this state statute, this Court may not adjudicate these claims. (*Id.*). As such, Plaintiff's claims against DYS, a state administrative agency, pursued under Ohio Revised Code section 4112 should be dismissed for lack of subject matter jurisdiction. (*Id.*).

Plaintiff responds that the authority cited by Defendant is persuasive rather than mandatory. (ECF No. 36 at 2). Instead of conceding this claim outright, Plaintiff argues that the Court, if it finds it is without jurisdiction, should transfer these claims "to the Ohio Court of Claims to determine whether immunity applies." (*Id.*). Plaintiff then argues that Ohio Revised Code Sections 4112.02 and 2743.03 do not require that such suits be exclusively brought in the Ohio Court of Claims. (*Id.* at 3). This, Plaintiff says, is true despite her arguing that the state waived its sovereign immunity as to such claims. (*Id.*).

As Plaintiff concedes, case law weighs heavily against her argument. Here, as in *Robertson v. Rosol*, "Plaintiff['s] argument is not well taken." No. 2:06CV1087, 2007 WL 2123764, at *4 (S.D. Ohio July 20, 2007); *Donahoo v. Ohio Dep't of Youth Servs.*, 237 F. Supp. 2d 844, 874 (N.D. Ohio 2002) (District Court finding that it lacked subject matter jurisdiction to hear Ohio state law claims under R.C. 4112). Even assuming, as Plaintiff argues, that the State of Ohio waived its sovereign immunity as to claims under R.C. 4112 et. seq., that does not give this Court subject

matter jurisdiction. Indeed, "a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation … [n]or … does it consent … by authorizing suits against it "in any court of competent jurisdiction." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (citing *Smith v. Reeves*, 178 U.S. 436, 441–445 (1900) and *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577–579 (1946)); see also *Donahoo*, 237 F. Supp. 2d at 874 (finding "State of Ohio has waived its immunity from suit and consented to having its liability determined by the state Court of Claims" despite the federal court finding it lacked jurisdiction).

Thus, even if the state courts of Ohio decide such actions do not need to be exclusively adjudicated in its Court of Claims, that decision is neither this Court's concern nor dispositive of the issue of whether this Court has jurisdiction. Instead, it is "the State's Eleventh Amendment immunity that answers this question." *Rosol*, 2007 WL 2123764, at *4 (citing *Hall v. Med. Coll. of Ohio at Toledo*, 742 F.2d 299, 301 (6th Cir. 1984)). Moreover, this rule extends to that state's agencies. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) ("Absent waiver, neither a State nor agencies acting under its control may be subject to suit in federal court.") (internal quotations omitted). Absent an ***explicit*** waiver of that immunity—and the Sixth Circuit held in *McCormick v. Miami University*, 693 F.3d 654, 664 (6th Cir. 2012) that Ohio has not invoked that waiver, this Court has no power to hear this claim.

Accordingly, Defendant's Motion for Judgment on the Pleadings as to state law claims 6, 7 and 8 is **GRANTED**.

B. Failure to State a Claim

Next, Defendant argues that Plaintiff fails to state a claim upon which relief can be granted with regard to Counts 2, 3, and 5. The Court addresses these arguments beginning with Count 5, continuing with Count 3, and concluding with Count 2.

1. Count 5: Fourteenth Amendment Due Process Rights Under 42 U.S.C. § 1983

Defendant argues that Plaintiff's claim under section 1983 fails because DYS is an improper defendant. (ECF No. 31 at 4). Defendant, relying on *Will v. Michigan Dept. of State Police,* contends that a § 1983 claim is properly asserted against a "person" acting under color of state law. (*Id.*) (citing 491 U.S. 58, 71). Because neither the state nor its officials acting in their official capacities are persons under section 1983, Plaintiff's claim against DYS—a state administrative agency—fails as a matter of law. (*Id.*). Plaintiff concedes this issue and requests that she be able to amend her complaint. (ECF No. 36 at 4). Because Plaintiff concedes this issue, the Court will not address whether this claim would fail for another independent reason. (*Id.*).

Accordingly, Defendant's Motion on this basis is **GRANTED**.

2. Count 3: Retaliation under Title VII

Next, Defendant contends that Plaintiff fails to allege a necessary element of a Retaliation claim under Title VII. (ECF No. 31 at 5). Specifically, Defendant argues that Plaintiff failed to allege that she was engaging in a protected activity as defined by that statute. (*Id.* at 6). Indeed, according to Defendant, such vague charges of discrimination are routinely rejected. (*Id.* at 7). Additionally, Defendant argues that Plaintiff also fails to demonstrate a causal connection between the alleged protected activity and the alleged adverse employment action. (*Id.* at 8). According to Defendant, by Plaintiff's own words "she only refused to retire or accept a lesser position when it

was allegedly presented to her." (*Id.*). Consequently, DYS made the allegedly adverse employment action before she engaged in the protected activity. As such, her claim must fail.

Plaintiff responds that Defendant mischaracterizes the issue. It was Plaintiff's resistance to discriminatory conduct that was protected by Title VII. (ECF No. 36 at 5). As a result of her resistance, DYS demoted her. (*Id.* at 6). In other words, Plaintiff insists there is a distinction between her supervisors demanding she voluntarily retire or take a lesser position and doing so involuntarily. (*Id.*). Further, Plaintiff disputes that her allegations regarding the causal connection between her resistance and her demotion are clear. (*See id.*). Plaintiff reiterates that she was punished by being forced to do something involuntarily that she would not do voluntarily. (*Id.* at 7). For these reasons, she says Defendant's argument must fail.

To assert "a prima facie case of retaliation under Title VII … the plaintiff bears the initial burden of establishing that (1) [s]he ... engaged in protected activity, (2) the employer knew of the exercise of the protected right, (3) an adverse employment action was subsequently taken against the employee, and (4) there was a causal connection between the protected activity and the adverse employment action." *Khalaf v. Ford Motor Co.*, 973 F.3d 469, 488–89 (6th Cir. 2020), cert. denied, 141 S. Ct. 1743, 209 L. Ed. 2d 508 (2021) (quoting *Beard v. AAA of Mich.*, 593 F. App'x 447, 451 (6th Cir. 2014)).

A plaintiff may satisfy the pleading requirement for protected activity by "alleging conduct that falls within one of two clauses in the statute, which says it is an:

> unlawful employment practice for an employer to discriminate against any of his employees ... [1] because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or [2] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Hamade v. Valiant Gov't Servs., LLC, 807 F. App'x 546, 549 (6th Cir. 2020) (quoting 42 U.S.C. § 2000e–3(a)). Accordingly, "[t]he first clause is known as the "opposition clause," and the second as the "participation clause." *Id.* The opposition clause, of the two, is the more expansive route. Specifically, "[t]he Supreme Court has held that the term "oppose" should be interpreted based on its ordinary meaning: "[t]o resist or antagonize ... ; to contend against; to confront; resist; withstand." *Jackson v. Genesee Cty. Rd. Comm'n*, 999 F.3d 333, 344 (6th Cir. 2021) (citing *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 276, 129 S.Ct. 846, 172 L.Ed.2d 650 (2009)). Additionally, "[e]xamples of opposition activity protected under Title VII include complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices; [and] refusing to obey an order because the worker thinks it is unlawful under Title VII." *Id.* (citing *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 721 (6th Cir. 2008) (internal quotations omitted)).

That said, there are limits to what satisfies the opposition clause. And "[w]hile the plaintiff's allegations of protected activity do not need to be lodged with absolute formality, clarity, or precision, the plaintiff must allege more than a vague charge of discrimination." *Id.* (citing *Yazdian v. ConMed Endoscopic Techs., Inc.*, 793 F.3d 634, 645 (6th Cir. 2015)). Indeed, a Plaintiff must put the defendant "on notice that her complaint concern[ed] statutory rights." *Brown v. VHS of Mich., Inc.*, 545 F. App'x 368, 373 (6th Cir. 2013).

Here, Plaintiff attempts to plead this element by asserting that she resisted her supervisors' insistence that she retire or accept a demotion on several occasions. When a co-worker expressed to Plaintiff's supervisor that he "wanted Plaintiff's job and that Plaintiff should retire," she responded, in her words, by "continu[ing] to resist and indicat[ing[that she intended to work until she was 65 years of age." On May 6, 2019, Plaintiff said "no" when her supervisor suggested that

she should retire or in the alternative, consider seeking a lower-paying position at a different location.

Although Plaintiff asserts that "she advised her supervisors that demanded her to retire, or take a lesser position, because of her gender, age and/or sexual orientation was discriminatory," this allegation only appears in the Complaint as quoted above and not in the factual allegation section. This is the precise type of "legal conclusion couched as a factual allegation" that this Court "is not bound to accept as true." *Long v. Insight Commc'ns of Cent. Ohio, LLC*, 804 F.3d 791, 794 (6th Cir. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Although Plaintiff provides no authority for the proposition that either saying "no," she intended to continue working until age 65, or asking why she was being demoted constitutes opposition under Title VII, she urges this Court to accept her view of the law. Although opposition is the more expansive pathway to satisfy the protected activity requirement, vague resistance, much like vague charges of discrimination, do not satisfy this element. *See Jackson*, 999 F.3d at 344.

Taken together, Plaintiff has neither pleaded activity under the participation clause nor the opposition clause. Because a failure to plead protected activity obviates the need to consider whether Plaintiff adequately pled a causal connection, this Court does not address that argument. As such, her Retaliation claim under Title VII is **DISMISSED.**

3. Count 2: Hostile Work Environment

Finally, Defendant argues that Plaintiff's claim for a Hostile Work environment under Title VII similarly fails. (ECF No. 31 at 9). First, to the extent she attempts to assert a claim based on age, it fails because age is not a protected class under Title VII.[1] (*Id.* at 8). Secondly, Defendant

[1] This argument is mirrored for the Retaliation Claim under Title VII. Because age is not a protected class under Title VII, to the extent Plaintiff attempts to assert an age-based claim, this claims fails. *See Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 834 (6th Cir. 1996) (Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1988 ed. and Supp. V) (race, color, sex, national origin, and religion).

maintains that Plaintiff failed to allege any discriminatory behavior that constituted harassment. (*Id.* at 9). For example, the absence of a celebration for a workplace milestone is simply not sufficient to support the conclusion that she worked in an abusive environment. (*Id.*). Even if she did feel unwelcome that is not enough to support the inference of severe or pervasive harassment. (*Id.* at 9–10). Furthermore, courts have dismissed such claims when plaintiffs assert only a few instances of harassing or offensive behavior. (*Id.*) (citing *Woodson v. Holiday Inn Express*, No. 18-1468, 2018 WL 5008719, at *2) (6th Cir. Oct. 4, 2018)). Because Plaintiff's complaint fails to reference even one instance of harassing or offensive behavior due to her sex or sexual orientation," this claim must fail. (ECF No. 37 at 5).

Plaintiff responds by noting that denial of a promotion and a demotion is evidence of a hostile work environment. (ECF No. 36 at 7). Moreover, she insists that these actions were motivated by her sexual orientation. (*Id.*). Plaintiff notes that her superiors were "friends and supporters of the LGBTIQ community." (*Id.* at 8). Importantly, according to Plaintiff, people outside of this group were excluded and unwelcome. (*Id.*). Plaintiff urges that this allegation can support her hostile work environment claim. (*Id.*). The Sixth Circuit has "broken this claim into five elements:

> (1) [The plaintiff] belonged to a protected group, (2) she was subject to unwelcome harassment, (3) the harassment was based on [sex], (4) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment, and (5) the defendant knew or should have known about the harassment and failed to act.

Nathan v. Great Lakes Water Auth., 992 F.3d 557, 565 (6th Cir. 2021) (citations omitted). Further, "[s]exual harassment in the workplace constitutes discrimination in violation of these provisions [w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is

sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Id.* at 564 (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998)). "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms of employment." *Brown v. Bd. of Educ. of Shelby Cty. Sch.*, 47 F. Supp. 3d 665, 682–83 (W.D. Tenn. 2014)).

The Sixth Circuit has recognized three ways to demonstrate that the harassment complained of was based on sex or sexual orientation: "(1) by showing that the harasser making sexual advances acted out of a sexual desire; (2) by showing that the harasser was motivated by general hostility to the presence of [women] in the workplace; or (3) by offering "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." *Kalich v. AT & T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012) (citing *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 765 (6th Cir. 2006) and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)).

Here, Plaintiff asserts that the constant demands for her to leave the office (by either retiring or taking another position), among other things, are sufficient to allege a claim of hostile work environment. Yet, despite Plaintiff's characterization of the demands for her to leave as being constant, she only asserts two isolated incidents in her Complaint: one on May 6th and another on May 10th. The balance of the "demands" to leave were apparently perpetrated by a co-worker, Mr. Alexander Stojsavljevic. She alleges that Stojsavljevic, in the presence of Plaintiff and her supervisor, made comments that "he wanted Plaintiff's job and that Plaintiff should retire."

Even if the above could ever be sufficient to support a claim of hostile work environment, Plaintiff has not adequately pled that this occurred because she is either a woman or because she is heterosexual. Instead, she makes the bald assertion that "her heterosexual status caused her to

be discriminated against by the LGBTIQ community of supervisors and employees." To support her conclusion, Plaintiff further states that "[o]thers outside of Plaintiff's protected groups were either not demoted or did not receive such a significant decrease in their compensation when moved to another position, or demoted due to discipline."

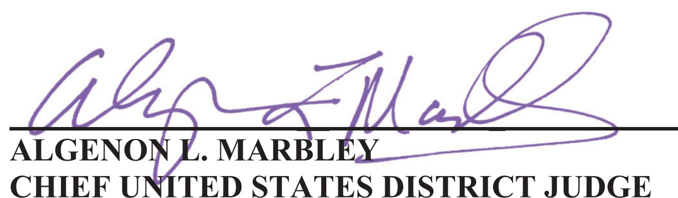
This conclusory allegation does not allow the Court to infer that complained of acts took place because of either her sex or sexual orientation. Even taking all of her factual assertions as true, the fact that some of her colleagues were rude to her (the man claiming that he wanted her job and that she should retire), did not throw her appreciation parties, or pressured her to retire or be transferred is not indicative of ***gender-based*** or ***sexual-orientation based*** bias. Moreover, her conclusory claims that these instances were motivated by such bias are without support. Instead, it appears that Plaintiff in presenting a collection of loosely related data points, expects this Court to draw the conclusion she did: that her colleagues singled her out because she was a heterosexual woman. But there is a sizable gap between what she has alleged and a cognizable claim of gender or sexual orientation-based discrimination.

Because she fails to allege an essential element of the hostile work environment cause of action—that the harassment she experienced was based on sex or sexual orientation—her claim necessarily fails and this claim is **DISMISSED**.

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion for Judgment on the Pleadings (ECF No. 31) is **GRANTED**. Count 4 is **DISMISSED WITH PREJUDICE.** Counts 2, 3, and 5 as well as Counts 6, 7, and 8 (the state law claims) are **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED.



ALGENON L. MARBLEY
CHIEF UNITED STATES DISTRICT JUDGE

DATED: March 29, 2022