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In The Supreme Court of the United States

WILLIAM J. SHELTON,
Petitioner

v.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY; GREGORY DREW, in his official and individual capacities,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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April, 2026

QUESTIONS PRESENTED

1. Whether this Court should overrule McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

2. Whether step three of the McDonnell Douglas burden-shifting framework requires a plaintiff to disprove the employer's proffered reason for the adverse employment action, when the text of Title VII provides that an action may have more than one motivating factor.

PARTIES TO THE PROCEEDINGS

William J. Shelton is the Petitioner and was the Plaintiff below in the District Court and Appellant in the Sixth Circuit Court of Appeals. Cuyahoga Metropolitan Housing Authority and Gregory Drew are Respondents and were Defendants below in the District Court and Appellees in the Sixth Circuit Court of Appeals.

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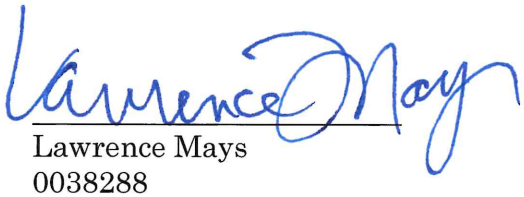
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 33.1(h), the undersigned certifies that this petition complies with the type limitations of this Rule.

1. The petition contains no more than 7,375 words in its entirety.

2. The brief has been prepared in 12-point Century typeface using WordPerfect.



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PETITION FOR WRIT O CERTIORARI

William J. Shelton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit Shelton v. CMHA, et al., 2026 WL 103234 (6th Cir. 2026) is unpublished and is reproduced in the appendix to this petition at App. B. The district court's orders on Respondent's motion for summary judgment and motion for judgment on the pleadings Shelton v. Cuyahoga Metropolitan, Housing Authority, et al., 2024 WL 4336371 (N. D. Ohio, 2024) is unpublished and reproduced at App. D.

JURISDICTION

The Sixth Circuit issued its opinion on January 14, 2026. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2(a)(1) provides:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

> privileges of employment, because of such individual's race, color, religion, sex, or national or national origin.

STATEMENT OF THE CASE

This is a statutory claim under Title VII that either Petitioner's race, and/or engaging in protected activity, were motivating factors in the adverse employment decisions that led to Petitioner's termination on January 29, 2021 by Respondent. The series of events that led to his termination began two years earlier in January of 2019. While there is plenty of evidence that illegitimate factors played a role in his termination, this is also a case of modern racial discrimination and retaliation. Respondent is an employer that is fully aware of its obligation under the law and has written policies that recognize that obligation. Respondent, like most modern employers, will not discriminate or retaliate openly.

ARGUMENT

The issues posed by this case are framed by the continued use of a prima facie pretext standard which is far beyond Title VII's requirements and the Rule 56 summary judgment standard. First, the McDonnell Douglas prima facie/pretext standard is not a required element of a Title VII case; rather, it is (in several circuits) a necessary element of a prima facie case of unlawful motive. Second, a Title VII

plaintiff is not required to plead the existence of a prima facie case. Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002). Third, a Title VII plaintiff is not required to prove the existence of a prima facie case at trial. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983). The question presented concerns what a plaintiff must do at summary judgment. It involves fundamental issues: whether at summary judgment a plaintiff is required to establish a prima facie case at all, and if so whether a plaintiff must establish as an element of that required prima facie case the existence of pretext before proceeding to trial.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit erred when it relied upon the McDonnell framework to dismiss Petitioner's Title VII claims. The McDonnell Douglas framework is a counter textual, judge-made hurdle that engenders conflict within the courts of appeals and denies plaintiffs with meritorious discrimination claims their day in court and a trial by jury. The lower courts' confusion regarding the application of McDonnell Douglas's third step is a nation-wide manifestation of the framework's fundamental problems. The McDonnell Douglas framework conflicts, indeed swallows, the text of Title VII and Rule 56 standards. At minimum, this Court should

clarify that a plaintiff, to survive summary judgment on discrimination claims, is not required to disprove an employer's proffered reasons for an adverse employment action.

I. MCDONNELL DOUGLAS SHOULD BE OVERRULED BECAUSE IT CREATES AN ARTIFICIAL, JUDGE MADE TEST THAT IS UNWORKABLE AND CONTRARY TO THE STATUTE

The McDonnell Douglas burden-shifting framework is not found in the text of the Civil Rights Act of 1964. Nor is the framework supported by the Title VII's legislative history. The McDonnell Douglas framework cannot be squared with the straightforward text of Title VII and Federal Rule of Civil Procedure 56. Under those provisions, the only question should be whether a plaintiff has created a genuine factual dispute over whether discrimination was a but-for cause of the adverse employment action. Instead, McDonnell Douglas requires courts to divert their attention from that critical question.

There is a split among the courts of appeals regarding what is required to prove pretext under the third step of that framework. The First, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits hold that a plaintiff must disprove the employer's proffered nondiscriminatory reasons for the adverse

employment action. The Second, Third, Fifth, Eighth, Tenth, and D.C. Circuits hold that disproving the employer's proffered reasons is not necessary to establish pretext, so long as the plaintiff provides other evidence of intentional discrimination. Only the latter method is consistent with the text of Title VII, Rule 56, and this Court's holdings regarding the statute's but-for causation requirement. In Bostock v. Clayton County, 590 U.S. 644 (2020), the Court held that Title VII is satisfied so long as the plaintiff's protected trait is one but-for cause of his termination. After Bostock, the employer's proffered reason could be true, yet the plaintiff may still be able to show that discrimination was also a but-for cause of the adverse action. The additional requirement grafted on by the court below and several other circuits--that a plaintiff must disprove the employer's proffered nondiscriminatory reasons--cannot be reconciled with Bostock's holding, the text of Title VII, nor Rule 56. Requiring a plaintiff to disprove the employer's proffered reasons is even more inappropriate under Title VII's "motivating factor" provision, which requires a lower standard of causation than Bostock. Several circuits recognize as much and eliminate or modify McDonnell Douglas's third step in motivating-factor cases. But the court below and other circuits hold otherwise.

Therefore, it is Petitioner's position that there are notable legal and practical flaws within the prima-facie/pretext standard that make its use by a Court reviewing a discrimination case for summary judgment an error of law. Those legal flaws are as follows: 1) as a practical matter the standard is simply different than what a jury will use at trial and leads to inconsistent results from how this Court will review the same evidence to determine questions of fact: 2) there are elements of the prima facie/pretext case that are not required to establish liability under Title VII and therefore, consideration of those elements is an error of law; 3) evidence under the fourth element of the prima facie case is sufficient as a matter of law to create a question of fact that race or retaliation is a motivating factor, and therefore to require anything further violates Title VII; and 4) regardless of whether the standard has been met by the fourth element of the prima-facie case, requiring the added burden of proving pretext is far beyond what is required by Title VII's text and the "a motivating factor" standard. Proof of pretext effectively requires proof that either (protected classification) was the sole factor, or under the various interpretations of pretext, requires a plaintiff provide proof that removes all legitimate motives from the employer. That is simply an additional

requirement of proving that the protected classification is the sole or only factor and requiring such proof at the summary judgment stage is an error of law. See, Sandra F. Sperino, Disbelief Doctrines, Berkley Journal of Employment and Labor Law, 2018, Vol. 39, No.1 (2018), pp.231-252.

Regardless of what standard the Court uses, Petitioner has sufficient evidence that either his particular classification (race) and/or his protected activity (verbal and written complaints during 2019 and 2020) were a motivating factor within Respondent's decision-making process that led to his eventual termination on January 29, 2021.

II. THE FEDERAL COURTS OF APPEALS ARE DIVIDED OVER WHETHER PLAINTIFFS MUST ESTABLISH A PRIMA FACIE CASE..

A. The First, Second, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits Require Plaintiffs show Prima Facie Case

The McDonnell Douglas framework is consistently applied at the summary judgment stage by federal circuit courts of appeals in employment discrimination cases. The Fourth Circuit regularly applies the McDonnell Douglas framework at summary judgment in Title VII cases and has done so for decades. It is considered the presumptive means of resolving such cases when circumstantial evidence

is presented. Hollis v. Morgan State Univ., 153 F.4th 369 (4th Cir. 2025).

The Ninth Circuit applies the McDonnell Douglas framework at summary judgment in both Title VII and Age Discrimination in Employment Act (ADEA) cases. It emphasizes that this framework is a procedural tool to assist plaintiffs in reaching trial and is not typically introduced at trial Shelley v. Geren, 666 F.3d 599 (9th Cir.2012), Sanders v. City of Newport, 2008 U.S. Dist. LEXIS 43197 (9th Cir. 2008).

The Fifth Circuit applies the McDonnell Douglas framework at summary judgment, rejecting alternative methods like the "pattern and practice" method for individual claims. It has consistently upheld this framework as the appropriate method for analyzing claims of discrimination at this stage. Celestine v. Petroleos de Venez. SA, 266 F.3d 343 (5th Cir. 2001).

The Tenth Circuit applies the McDonnell Douglas framework to evaluate claims of discrimination based on circumstantial evidence. It has affirmed that a plaintiff can survive summary judgment by establishing a prima facie case and presenting evidence of pretext. Reynolds v. School Dist. No. 1, 69 F.3d 1523 (10th Cir. 1995).

The Sixth Circuit applies the McDonnell Douglas framework to both federal and state-law discrimination claims, including those under Title VII and state civil rights statutes. Loyd v. Saint Joseph Mercy Oakland, 766 F.3d 580 (6th Cir. 2014).

The Second Circuit applies the McDonnell Douglas framework at the summary judgment stage for Title VII claims, as well as for claims under the ADEA. Aulicino v. New York City Dep't of Homeless Servs., 580 F.3d 73 (2nd Cir. 2009), Peddy v. L'Oreal USA, Inc., 848 Fed. Appx. 25 (2nd Cir. 2021).

The First Circuit employs the McDonnell Douglas framework in discrimination cases, requiring plaintiffs to establish a prima facie case, after which the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse action. The plaintiff must then demonstrate pretext to survive summary judgment . Thompson v. Coca-Cola Co., 522 F.3d 168 (1st Cir. 2008), Rios v. Centerra Grp. LLC, 106 F.4th 101 (1st Cir. 2024).

B. The First, Seventh, Fourth, Ninth, and Eleventh Circuits Have Expressed Skepticism and Cast Doubt on the use and continued validity of the McDonnell Douglas burden shifting framework at the summary judgment stage.

These courts emphasize the standard's limitations. In Tynes v. Fla. Dep't of Juv. Just., 88 F.4th 939 (11th Cir. 2023) the Eleventh Circuit critiqued the overemphasis on the McDonnell Douglas framework, particularly at the summary judgment stage. The court noted that parties and courts often misinterpret the framework as a substantive standard of liability rather than an evidentiary tool. The majority opinion highlighted that courts have increasingly treated the prima facie case requirement as a substitute standard necessary to survive summary judgment, which is a misapplication of the framework . Tynes v. Fla. Dep't of Juv. Just., 88 F.4th 939 (11th Cir. 2023).

The Ninth Circuit has repeatedly emphasized that the McDonnell Douglas framework is not mandatory at the summary judgment stage. In McGinest v. GTE Serv. Corp., 360 F.3d 1103 (9th Cir. 2004) the court held that plaintiffs may choose to proceed either under the McDonnell Douglas

framework or by presenting direct or circumstantial evidence of discrimination. This flexibility underscores the court's view that the framework is not indispensable for resolving summary judgment motions. McGinest v. GTE Serv. Corp., 360 F.3d 1103 (9th Cir. 2004), Similarly, in Metoyer v. Chassman, 504 F.3d 919 (9th Cir. 2007) the court reiterated that the framework is a useful tool but not a required method for plaintiffs to establish their claims.

The Seventh Circuit has expressed significant skepticism about the McDonnell Douglas framework. In Purtue v. Wis. Dep't of Corr., 963 F.3d 598 (7th Cir. 2020). the court emphasized that the framework is merely one method for plaintiffs to present their case and that the central question at summary judgment is whether there is evidence to permit a reasonable factfinder to conclude that discrimination occurred. The court highlighted that plaintiffs may rely on direct or circumstantial evidence instead of the burden-shifting framework . Purtue v. Wis. Dep't of Corr., 963 F.3d 598 (7th Cir. 2020). Additionally, in Morgan v. SVT, LLC, 724 F.3d 990 (7th Cir. 2013), the court suggested that the "direct" approach should be the default rule, as it avoids the rigidity associated with the McDonnell Douglas framework . Morgan v. SVT, LLC, 724 F.3d 990 (7th Cir. 2013).

The First Circuit has also questioned the necessity of strict adherence to the McDonnell Douglas framework at the summary judgment stage. In Calero-Cerezo v. United States DOJ, 355 F.3d 6 (1st Cir. 2004). The court noted that the framework is not a rigid test and that courts may focus on the sufficiency of the evidence as a whole to determine whether there is a genuine issue of material fact regarding pretext and discriminatory animus. Calero-Cerezo v. United States DOJ, 355 F.3d 6 (1st Cir. 2004).

These critiques reflect a broader trend among federal appellate courts to move away from rigid application of the McDonnell Douglas framework at the summary judgment stage. They focus instead on whether the evidence as a whole creates a triable issue of fact regarding discrimination. Such an approach aligns with the overarching standard under Rule 56 of the Federal Rules of Civil Procedure, which requires courts to determine whether there is a genuine dispute as to any material fact. USCS Fed Rules Civ Proc R 56.

C. The Third, Fifth, Sixth, Tenth, and Eleventh Circuit Courts of Appeals also further apply a rigorous standard for evaluating "pretext" at the summary judgment stage in discrimination cases.

The Eleventh Circuit requires a plaintiff to demonstrate both that an employer's stated reason was false and that discrimination was the real reason for the employment action. Poer v. Jefferson Cnty. Comm'n, 100 F.4th 1325 (11th Cir. 2024) and Ezell v. Wynn, 802 F.3rd 1217 (11th Cir. 2015)

III. THE PRIMA-FACIE/PRETEXT STANDARD VIOLATES THE TEXT OF TITLE VII.

The issue before this Court is whether there is a question of fact from which a jury could conclude that race, and/or protected activity, were motivating factors in the decision-making process that resulted in the termination of Petitioner. Petitioner asks this Court to review the claims under the McDonnell Douglas -- prima-facie/pretext standard. Petitioner has sufficient evidence within that standard, but he asks this Court to reject that standard because of the clear legal flaws within that standard, and to apply the same legal standard to the facts that a jury will see at trial. The issue at trial will be whether a (protected classification or activity) is a motivating

factor. All other questions are either not relevant for summary judgment or are simply evidence a jury may use to find that race (and/or protected activity) was a motivating factor.

Because many Circuits still use the prima facie case analysis, Petitioner provided evidence that met those criteria. However, the prima-facie/pretext analysis no longer has a place along side Title VII.

A. The Traditional Prima Facie/Pretext Analysis of Race and Retaliation:

Should the Court choose to follow the prima-facie/pretext analysis, it should use the standards for evaluation of employment discrimination claims that the Supreme Court has set forth in McDonnell Douglas v. Green, 411 U.S. 792 (1973), clarified in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), and modified in Desert Palace v. Costa, 539 U.S. 90 (2003). Under the McDonnell Douglas burden-shifting paradigm, analysis of discrimination claims begins with a determination of whether the plaintiff, aggrieved by an adverse employment action, can establish a prima facie case of race discrimination[1] or retaliation if so,

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The prima facie case involves four flexible elements. They are: 1) that plaintiff was in a protected class. This element is established because Petitioner is black; 2) that plaintiff was qualified for the position. While defendant disputes this element and tries to articulate it as "meeting the legitimate

the burden of production, but not persuasion, shifts to the employer to articulate a legitimate, non-discriminatory reason for its employment decisions; finally, to prevail, the plaintiff must overcome the employer's proffered explanation by showing that the real reason for adverse employment action is discrimination or pretextual. See McDonnell Douglas, 411 U.S. at 802-04.

B. Specific Legal Flaws in the Prima-Facie Case/Pretext Analysis

There are several significant legal flaws within the prima-facie/pretext standard. There are, even within the standard elements of the prima-facie case, combined with the burden shifting and pretext, several legal flaws that directly contradict Title VII. The first legal flaw is the requirement of added steps

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expectations" of the employer, the original standard was whether he was simply qualified. Petitioner was clearly qualified because he was employed for years performing the daily duties of the job and showing up on time. He had perfect attendance and an excellent safety record; 3) that plaintiff suffered an adverse employment action.; and 4) that other non-black persons were not treated the same or some other indication that race (or retaliation) could be a factor. There is evidence of differences in treatment regarding how Petitioner was trained, tested and subjected to investigations and discipline. There are other indicators of race discrimination in the attitude of management toward Pettioner and his efforts to raise issues of discrimination. McDonnell Douglas, 411 U.S. at 792.

of any kind or degree beyond the proof of the four elements of the prima-facie case. The second flaw is requiring proof of pretext as that added step before allowing a minority employee to proceed to a jury.

The Prime-Facie Case (prior to the pretext step) is the Equivalent of the "A Motivating Factor" Standard Under Title VII.

The fourth element of the prima facie case states "4) that other non-black persons were not treated the same or some other indication that race (or retaliation) could be a factor" - or as the Defendant characterizes it, "gives rise to an inference of unlawful discrimination." If Petitioner provides evidence that race was a factor at the prima-facie stage, why would we go any further? Petitioner, under the standard within Title VII and the current law confirming that standard would have established a question of fact on the ultimate issue. Therefore, at that point it would not matter one iota if the defendant provided 100 additional legitimate factors. At the summary judgment stage, the issue is whether the plaintiff has sufficient evidence that unlawful discrimination was a motivating factor.

Legal Flaw in the Pretext Analysis

The second, and far more serious flaw in the prima-facie/pretext analysis is the added requirement or expectation that an employee show that the

reason(s) offered to justify the adverse action are pretextual. Respondent's interpretation of this standard again seeks to make it a standard more onerous than is required. Regardless of how interpreted there cannot be any added requirement that an employee show the employer's decision was pretextual as a precondition to proceeding to trial. Such a requirement is in direct contravention of Title VII.

If Petitioner is required to establish at the summary judgment stage that the real reason for termination was race, (pretext) then he is being required to establish that race was the sole factor. Title VII only requires that he show it to be a factor. Likewise, if Petitioner is required to establish that Respondent's reason for termination was an utter fabrication that also suggests that he is required to prove that race was the sole factor or the only factor. A requirement that a plaintiff show that the reason is an utter fabrication suggests the removal of all legitimate factors from the decision-making process. That is not required by the plain language of the statute or by any Circuit's interpretation of that language.

C. The Effect of Bias or Motive on Judgment and Perception

The record in this case also includes the report and deposition of Professor Eric Nielson. Professor Nielson explained the role and effect of bias in assessing rap music, such as Petitioner's videos. The Title VII standard of a motivating factor reflects reality that within any employment decision there are a series of decisions and judgments that are founded one upon another and that within any one of those decisions, race, gender or retaliation can operate as a factor that affects those decisions. Once the human stain that is negative perceptions regarding race is introduced, and once the additional stain of a desire to retaliate or punish is added to it, the effect on judgment is substantial.

Part of the logic behind Costa was to acknowledge that it makes no sense to allow a jury to place a man in jail in a criminal case based on circumstantial evidence and refuse to allow a jury to hold an employer responsible for removing barriers related to race or gender from the workplace.

As the jury makes a decision of whether the actions of the criminal defendant are reasonable or indications of guilt, the jury can consider that how and why human guilt is working in this mind. The stain of racial bias, or a lack of respect for issues of

race, or feelings of resentment toward complaints of race, or fear of exposure or even stereotyped views are simply factors that affect mental processes. A jury is entitled to decide what factors are in play within the decisions of the employer. A jury, looking at credibility, can make this assessment with the same surety as it puts a man in prison for murder based on circumstantial evidence.

Despite rejecting Petitioner's argument, though not raised below, that McDonnell Douglas should not be required of plaintiffs in employment discrimination cases, the Sixth Circuit proceeded to analyze the facts of Petitioner's termination using the very same McDonnell Douglas analysis. Opinion p.6. The Sixth Circuit claimed that Petitioner failed to adequately rebut (what is the Circuit's measure of adequate rebuttal) Respondent's legitimate non-discriminatory reason for his termination, asserting that Petitioner failed to create a genuine issue of material fact. But, on this petition the question is whether McDonnell Douglas requires plaintiffs asserting Title VII discriminatory treatment claims to establish a prima facie case including pretext. Such an inquiry is firmly within the scope of the question presented. Gross v. FBL Financial Services, 557 U.S. 167, 173 n.1 (2009)."[T]he statement of any question presented is

deemed to comprise every subsidiary question fairly included therein." Sup. Ct. Rule 14.1. See also, City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 214, n.8 (2005).

In its opinion the Sixth Circuit relied upon Tingle v. Arbors at Hilliard, 692 F.3d 523, 531 (6th Cir. 2012), which addresses the application of the "honest belief" doctrine in employment discrimination and retaliation cases. See Sperino, Disbelief Doctrines, pp.238-240.

The Sixth Circuit held that when an employer reasonably and honestly relies on particularized facts in making an employment decision, it is entitled to summary judgment on the issue of pretext, even if its conclusion is later shown to be mistaken, foolish, trivial, or baseless. The court emphasized that the key inquiry is whether the employer made a reasonably informed and considered decision before taking the adverse employment action . Tingle v. Arbors at Hilliard, 692 F.3d 523 (6th Cir. 2012), Beny v. Univ. of Mich., 2025 U.S. App. LEXIS 19099 (6th Cir. 2025).

In Tingle, the plaintiff, a nurse, alleged that her termination was retaliatory after she participated in an investigation by the Ohio Department of Health. The employer argued that the termination was based on violations of its progressive

discipline policy. The court found that the plaintiff failed to demonstrate pretext because the employer had conducted reasonable investigations into the alleged violations and made decisions based on the facts available at the time. The court further noted that the plaintiff's challenges to the employer's decisions did not undermine the employer's honest belief in the reasons for her termination. Tingle v. Arbors at Hilliard, 692 F.3d 523 (6th Cir. 2012). See Sperino, Disbelief Doctrines, pp.238-240.

The court also clarified that the honest belief doctrine does not require the employer's decision-making process to be optimal or exhaustive. Instead, the employer must point to particularized facts upon which it reasonably relied. If the employee cannot produce evidence showing that the employer's decision-making process was unworthy of credence, the honest belief doctrine shields the employer from liability. Tingle v. Arbors at Hilliard, 692 F.3d 523 (6th Cir.2012).

This principle has been consistently applied in subsequent cases, reinforcing that an employer's honest belief in its proffered reason for an adverse action precludes a finding of pretext, provided the decision was reasonably informed and based on particularized facts. Beny v. Univ. of Mich., 2025 U.S. App. LEXIS 19099 (6th Cir. 2025).

The Sixth Circuit's "Honest Belief" Doctrine

The "honest belief" doctrine, as relied upon in the opinion below, is being applied too broadly and without the Sixth Circuit's limiting requirements-namely, that the employer's belief must be grounded in reasonable reliance on particularized facts and a reasonably informed, considered decision-making process.

The Sixth Circuit's honest-belief rule is not a blanket immunity whenever an employer asserts it "honestly believed" its reason; rather, the employer must show its belief arose from reasonable reliance on the particularized facts before it at the time of the decision. Ferrari v. Ford Motor Co., 826 F.3d 885 (6th Cir. 2016. The doctrine's rationale is intent-focused: if the employer honestly (even mistakenly) believed its nondiscriminatory reason, it may lack discriminatory intent-but only if the belief is honestly held in the sense described above (reasonable reliance on particularized facts). Ferrari v. Ford Motor Co., 826 F.3d 885, Marshall v. Rawlings Co. LLC, 854 F.3d 368. The Sixth Circuit also cautions that courts should not "blindly assume" an employer's stated reasons are honest; the honest-belief rule is a rebuttal mechanism at the pretext stage, not an automatic win. Loyd v. Saint Joseph Mercy Oakland, 766 F.3d 580 (6th Cir. 2014). While the employer's

investigation need not be "optimal" or exhaustive, the key inquiry remains whether the employer made a reasonably informed and considered decision before acting; correspondingly, a plaintiff can defeat the doctrine by pointing to evidence the employer failed to do so. Babb v. Maryville Anesthesiologists P.C., 942 F.3d 308 (6th Cir. 2019).

IV. Tingle / Honest Belief

A. The Circuit's honest belief as a near-automatic shield; Sixth Circuit law imposes a threshold showing by the employer.

Respondent's framing risks swallowing the doctrine into: if the employer says it believed its reason, the court believes and pretext fails. But Sixth Circuit authority requires more: the employer must establish reasonable reliance on particularized facts available at the time of the decision. Ferrari v. Ford Motor Co., 826 F.3d 885.

B. "Mistaken, foolish, trivial, or baseless" does not mean "unsupported"; the doctrine still requires a reasonably informed and considered decision.

Even where Sixth Circuit cases recognize an employer may prevail despite a decision later appearing mistaken, the doctrine still turns on whether the employer's belief was honestly held

through a reasonably informed and considered process, not merely asserted after the fact. Ferrari v. Ford Motor Co., 826 F.3d 885.

C. Respondent's termination decision was not reasonably informed/considered.

Sixth Circuit law expressly recognizes that a plaintiff can overcome honest belief by pointing to evidence that the employer failed to make a reasonably informed and considered decision before taking the adverse action. Babb v. Maryville Anesthesiologists P.C., 942 F.3d 308 (6th Cir. 2019). Thus, it is not enough for the employer to say it investigated; the question is whether the investigation and decisional process were sufficiently grounded in particularized facts such that the belief can be deemed "honestly held" under Sixth Circuit standards. Ferrari v. Ford Motor Co., 826 F.3d 885 Relatedly, the response's emphasis that an investigation need not be "optimal" risks obscuring that the doctrine still requires a process that is reasonably informed and considered; "not optimal" is not the same as "any process at all." Ferrari v. Ford Motor Co., 826 F.3d 885.

D. The Sixth Circuit's "bare assertion" framing is incomplete; Sixth Circuit distinguishes between disputing underlying facts and challenging whether reliance on those facts was reasonable.

The response suggests that if an employee disputes the employer's factual conclusions, that is insufficient. Sixth Circuit authority indeed states that a bare assertion that the proffered reason has no basis in fact is insufficient to call honest belief into question. Babb v. Maryville Anesthesiologists P.C., 942 F.3d 308 But Sixth Circuit authority also recognizes a distinct and viable challenge: evidence that the employer failed to make a reasonably informed and considered decision (i. e. , the process and reliance were unreasonable), which goes beyond merely saying "the employer was wrong." Babb v. Maryville Anesthesiologists P.C., 942 F.3d 308.

E. Honest belief is a summary-judgment rebuttal at step three, not a substitute for the pretext inquiry.

The honest-belief rule operates within the McDonnell Douglas burden-shifting framework at the third step (pretext), meaning it is part of the pretext analysis-not a doctrine that eliminates the need to scrutinize the employer's explanation and decisional

basis. Briggs v. Univ. of Cincinnati, 11 F.4th 498 (6th Cir. 2021), Loyd v. Saint Joseph Mercy Oakland, 766 F.3d 580.

Properly framed under Sixth Circuit law, "honest belief" is not satisfied by an employer's asserted sincerity alone; it requires reasonable reliance on particularized facts and a reasonably informed and considered decision-making process, and it remains subject to rebuttal where the plaintiff can show the process was not reasonably informed/considered (or otherwise unworthy of credence).

"Honest Belief" Defense Under Tingle (Sixth Circuit)

Whether, on these additional facts, the defendant can invoke the Sixth Circuit's "honest belief" doctrine to obtain summary judgment, or whether a reasonable jury could instead find the defendant's asserted policy-based rationale is pretextual because the defendant's decisional process was not "reasonably informed and considered" and/or involved an error "too obvious to be unintentional."

V. Honest Belief Is Conditional, Not Automatic.

The Sixth Circuit recognizes that summary judgment may be appropriate where no reasonable jury could find the employer's stated reason pretextual. Beny v. Univ. of Mich., 2025 U.S. App. LEXIS 19099 (6th Cir. 2025). Under the Sixth

Circuit's honest-belief rule, summary judgment may also be proper where it would be clear to a jury that the employer honestly believed its proffered nondiscriminatory or nonretaliatory reason, even if that reason is later proven false. Beny v. Univ. of Mich., 2025 U.S. App. LEXIS 19099. But the doctrine has limiting principles that matter here: A plaintiff can undercut honest belief by producing evidence that the employer failed to make a "reasonably informed and considered decision" before acting, rendering the decisional process "unworthy of credence." Beny v. Univ. of Mich., 2025 U.S. App. LEXIS 19099. A plaintiff may also undermine honest belief by producing evidence that the employer's error was "too obvious to be unintentional." Beny v. Univ. of Mich., 2025 U.S. App. LEXIS 19099. At the same time, the plaintiff must do more than merely dispute the underlying facts on which discipline was based. Beny v. Univ. of Mich., 2025 U.S. App. LEXIS 19099.

VI. Additional Record Facts Support Multiple, Independent Routes to Defeat Honest Belief

A. The Respondent's undisclosed "First Amendment assessment" supports an inference its' decisional process was not candid or "reasonably informed and considered."

The Respondent's own internal assessment allegedly concluded that ten of Petitioner's fifteen rap videos were protected speech, yet the Respondent did not disclose that assessment to the Petitioner and instead framed the issue solely as five "vulgar" videos violating its image/public-perception policy.

A reasonable jury could view that as evidence the defendant's process was not a straightforward, reasonably informed evaluation of the actual basis for discipline, but rather a selective presentation of the rationale designed to justify a predetermined outcome. That is precisely the kind of evidentiary showing Sixth Circuit law recognizes as capable of making the decisional process "unworthy of credence," thereby undercutting honest belief. Beny v. Univ. of Mich., 2025 U.S. App. LEXIS 19099

B. Termination over five videos while conceding (internally) that ten were protected can be argued as an "obvious error" in the employer's stated rationale.

The defendant's position, as stated in the facts, is that the termination was for five videos allegedly violating an image/public-perception policy, while the defendant's own assessment found ten videos were protected speech.

Even accepting that an employer may discipline for policy violations, a jury could find it "too obvious to be unintentional" that the employer would (1) conduct a constitutional/protected-speech assessment, (2) conclude most of the content is protected, and yet (3) proceed to termination without transparently grappling with that conclusion in its communications and decision rationale. Sixth Circuit law recognizes that an "error" that is "too obvious to be unintentional" can defeat the honest-belief defense at summary judgment. Beny v. Univ. of Mich., 2025 U.S. App. LEXIS 19099.

C. The failure to ask the Petitioner to remove the videos supports an inference the stated "image/public perception" rationale was not genuinely the motive.

The Respondent did not ask or instruct the plaintiff to remove the videos before terminating him.

A jury could reasonably infer that if the employer's true motive were to protect its' image and public perception, a less drastic, directly remedial step-requesting removal-would naturally be part of a "reasonably informed and considered" approach, particularly where the employer had already differentiated between protected and allegedly unprotected content. The absence of that step is probative not because the employer must use progressive discipline in every case, but because it tends to show the employer's asserted rationale may not have been the real reason it acted, which is the core pretext inquiry the honest-belief doctrine does not eliminate.

D. Neither the Respondent nor the Sixth Circuit can reduce the dispute to "plaintiff disagrees with our conclusion"; the Petitioner's challenge targets the integrity of the decisional process.

The Respondent will likely argue that the Shelton is merely disputing whether the five videos were "vulgar" or violated policy, and that such disputes do not defeat honest belief. Sixth Circuit law indeed requires more than a dispute over the facts underlying discipline. Beny v. Univ. of Mich., 2025 U.S. App. LEXIS 19099.

But the Petitioner's argument on these facts is different: the employer allegedly performed an internal protected-speech assessment, reached a conclusion favorable to the plaintiff as to ten videos, withheld that assessment, and proceeded as though only the five videos mattered-without first seeking removal or otherwise narrowing the perceived harm. That is evidence about the quality and credibility of the employer's decisional process, not merely a disagreement about vulgarity. Sixth Circuit law expressly recognizes that evidence showing the employer failed to make a reasonably informed and considered decision can defeat honest belief. Beny v. Univ. of Mich., 2025 U.S. App. LEXIS 19099

On these additional facts, the plaintiff has a substantial basis to argue that the defendant's asserted "honest belief" is not dispositive at summary judgment because a reasonable jury could find the defendant's decisional process was "unworthy of credence" and/or that the asserted rationale involved an "obvious" error inconsistent with a genuinely held belief.

There are additional facts in the record about the Respondent's selective focus on five of fifteen rap videos and its undisclosed internal First Amendment assessment. The core point is that Tingle does not create automatic immunity; it frames a summary-judgment inquiry into whether a reasonable jury could find pretext, including where the employer's asserted belief is challenged as not genuinely or credibly held on the record.

This record includes the Affidavit of Thomas Williams, former Respondent CMHA officer and Petitioner's partner. Paragraphs 12-13 provide that as a member of Respondent's SWAT Team, he participated in the production of a movie depicting SWAT Team members killing people and drug dealers to steal money. The movie was titled 'Renegade Force'. The film is available on YouTube and lists Thomas Williams and current Respondent Lieutenant as actors in the film. Williams also states

that other respondent officers charged with conduct unbecoming were arrested for domestic violence or unsafe operation of a vehicle while serving as a respondent police officer but only charged or suspended departmentally, not terminated. Williams Affidavit was attached as Exhibit 3 to Plaintiff's Response in Opposition to the Motion for Summary Judgment.

In the Sixth Circuit, summary judgment for an employer is appropriate where no reasonable jury could find the employer's reason for an adverse action is pretextual. Beny v. Univ. of Mich., 2025 U.S. App. LEXIS 19099.

Under the "honest-belief rule" as described in Tingle, summary judgment is also proper when it would be clear to a jury that the employer had an honest belief in its proffered nondiscriminatory (or nonretaliatory) reason, even if the reason is later proven false. Beny v. Univ. of Mich., 2025 U.S. App. LEXIS 19099. The Sixth Circuit has recognized that an employer's failure to follow self-imposed procedures is generally insufficient, standing alone, to establish pretext; however, failure to uniformly apply a progressive discipline policy can be evidence of pretext, particularly where the employer asserts that policy as a rationale for termination, and such evidence may be considered as part of the

"constellation of evidence." Kean v. Brinker Int'l, Inc., 140 F.4th 759. For public-employee First Amendment retaliation claims in the Sixth Circuit, the analysis is described as a three-step process: (1) whether the speech is protected (public concern plus balancing), (2) whether the adverse action would chill an ordinary person, and (3) whether the speech was a substantial or motivating factor in the adverse action. Taylor v. Keith, 338 F.3d 639. In speech cases, it is not enough at summary judgment to show that an adverse employment action followed speech the employer would have liked to prevent or eliminate; the plaintiff must show discharge because of speech involving a matter of public concern. Collyer v. Darling, 98 F.3d 211.

Tingle permits plaintiff to attack whether the asserted "honest belief" is genuinely credible on this record, not merely whether the employer can articulate a policy-based reason.

The defendant's anticipated position is that it honestly believed five videos violated an image/public-perception policy and terminated plaintiff on that basis. But Tingle frames the dispositive question at summary judgment as whether "no reasonable jury could find" pretext, and separately whether it would be clear to a jury that the employer had an honest belief in its proffered

reason. Beny v. Univ. of Mich., 2025 U.S. App. LEXIS 19099 On these facts, plaintiff can argue a reasonable jury could view the defendant's asserted belief as strategically narrowed and selectively presented (five "vulgar" videos) after the defendant internally concluded that ten videos were protected, which undermines the clarity and credibility of the claimed "honest belief.".

The undisclosed internal First Amendment assessment supports an inference that the defendant's stated rationale is selectively curated, which a jury may treat as evidence of pretext.

Petitioner's argument is not "the employer was wrong," but "the employer's explanation is incomplete and selectively framed.". The Respondent conducted an internal First Amendment assessment, concluded ten videos had First Amendment protection, did not reveal that assessment to plaintiff, and instead focused on five allegedly vulgar videos. Such internal sorting is probative because it shows Respondent recognized (at least internally) that the termination decision implicated protected-speech considerations, yet presented the decision externally as a straightforward image/public-perception policy violation without disclosing the broader assessment. That creates a triable issue whether the asserted "honest belief" is the real reason or a post hoc

justification-precisely the kind of pretext question Tingle reserves for the jury unless the record makes honest belief "clear." Beny v. Univ. of Mich., 2025 U.S. App. LEXIS 19099.

Respondent's failure to request removal of the videos can be argued as circumstantial evidence that "image/public perception" was not the actual motivating concern.

Petitioner submits that where the employer's true concern was reputational harm from online content, a natural remedial step would be to ask the employee to remove the content before imposing the most severe sanction. Respondent did not ask or tell plaintiff to take the videos down. While Tingle does not require an employer to choose the least severe response, the absence of any request to remove the videos is circumstantial evidence that the employer's stated "image/public perception" rationale is not the genuine driver of the decision, supporting a reasonable jury finding of pretext. This argument fits within Tingle's summary-judgment framing: if a reasonable jury could infer pretext from the surrounding circumstances, summary judgment should be denied. Beny v. Univ. of Mich., 2025 U.S. App. LEXIS 19099.

When Respondent relies on "policy" as the rationale, there is evidence of record on Respondent's

selective enforcement and lack of uniform application as part of the "constellation of evidence".

The Respondent's stated basis is that five videos violated its policy on image and public perception. Where an employer invokes internal policy as the justification, Sixth Circuit authority recognizes that non-uniform application of discipline policies (particularly progressive discipline policies) can be evidence of pretext and can be considered as part of the overall evidentiary picture, even if not sufficient alone. Kean v. Brinker Int'l, Inc., 140 F.4th 759. Plaintiff can extend this principle by arguing that the defendant's decision to terminate based on five videos-without first requesting removal and while internally concluding ten videos were protected-supports an inference of selective enforcement or an unusually escalated response inconsistent with a neutral, policy-driven decision. Even if the defendant contends it had discretion, the combination of (1) selective focus on five videos, (2) nondisclosure of the internal assessment, and (3) no request to remove content is the kind of "constellation of evidence" from which a jury could infer pretext.

To the extent First Amendment retaliation concepts are in play, the defendant's internal assessment can be used to sharpen causation arguments, not merely "temporal sequence"

The facts include that the defendant conducted a First Amendment assessment and concluded ten videos had First Amendment protection. Sixth Circuit authority (in the public-employee context) describes a structured retaliation inquiry requiring protected speech and causation (speech as a substantial or motivating factor), and cautions that it is not enough to show an adverse action followed speech the employer would have liked to prevent. Taylor v. Keith, 338 F.3d 639, Collyer v. Darling, 98 F.3d 211. Plaintiff can use the internal assessment to argue the defendant was not merely reacting to "vulgarity," but was actively evaluating the speech's protected status and then terminating based on a subset of that speech-supporting an inference that the speech itself (and not a neutral policy concern) was a substantial or motivating factor. Even if the court ultimately treats the case as a non-First Amendment employment dispute, the internal assessment remains relevant circumstantial evidence bearing on motive and pretext under Tingle's summary-judgment framework.

CONCLUSION
THIS CASE IS AN EXCELLENT VEHICLE TO ADDRESS THE IMPORTANT QUESTIONS PRESENTED

This petition raises issues of great jurisprudential and practical import. Especially as currently applied, the McDonnell Douglas framework is preventing meritorious employment-discrimination cases from reaching a jury. When plaintiffs have presented evidence that creates a fact issue regarding whether they were discriminated against, they should be permitted to try their case to a jury. That is how it works in virtually every other context. There is no reason that plaintiffs in Title VII cases should face the added burden of disproving the employer's proffered reason for the adverse employment decision. Yet that errant and nontextual view holds sway in nearly half the country and is causing demonstrable injustices for worthy plaintiffs. This Court's review could more closely align the analysis of Title VII cases with the words of the statute and the way other cases are decided on summary judgment under Rule 56.

On these additional facts, Respondent's "honest belief" defense fails because Tingle requires summary judgment only where no reasonable jury could find pretext and where honest belief would be

clear to a jury, and Respondent's selective focus on five videos, nondisclosure of its internal First Amendment assessment, and failure to request removal together create a triable issue of pretext.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No.24-3933

FILED
Jan 14, 2026
KELLY L. STEPHENS, Clerk,

WILLIAM J. SHELTON,

Plaintiff-Appellant,

v.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY; GREGORY DREW, in his official and individual capacities,

Defendants-Appellees.

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

JUDGMENT

On Appeal from the United States District Court for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

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

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

No.24-3933

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 14, 2026
KELLY L. STEPHENS, Clerk,

WILLIAM J. SHELTON,

Plaintiff-Appellant,

v.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY ang GREGORY DREW,

Defendants-Appellees.

OPINION

On Appeal from the United States District Court
for the Northern District of Ohio.

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

HELENE N. WHITE, Circuit Judge.

Plaintiff–appellant William Shelton sued the Cuyahoga Metropolitan Housing Authority (CMHA), alleging First Amendment and Title VII violations. The district court dismissed the First Amendment claims as untimely and granted summary judgment in CMHA's favor on the Title VII claims. We **AFFIRM**.

I. FACTUAL BACKGROUND

Shelton was an officer with the CMHA police department, beginning his career in 2016. He worked as a detective and sometimes joined SWAT team operations. His duties included responding to service calls, enforcing CMHA policies, and securing CMHA properties.

Shelton also describes himself as a "rap artist." Appellant's Br. at 4. Others in CMHA were aware that Shelton rapped, including CMHA Police Chief Andreas Gonzalez and Shelton's supervisor, Sergeant John Smiddy. Gonzalez may have even invited Shelton to perform at an event. Shelton warned Gonzalez that his rap was "vulgar." R. 46-3 PID 2002–03. However, Shelton provides no evidence that anyone was aware of the following videos: "Head Shot," which depicts Shelton mock executing a "homeless man." R. 13, PID 169; "WAP Remix – Dry Ass Nookie," which contains graphic sexual lyrics and depicts Shelton brandishing a knife while stating, "Bitch I'm about to slay you." R. 34-28, PID 1045–50; "The Great Man Challenge," which shows Shelton sitting in the front seat of his car, holding a gun in his hand and a faux alcohol bottle in his lap, R. 34-1, PID 802–04; and "Bust Down Thotiana" and "Talk My Shit Challenge," which contain violent lyrics or derogatory comments about women. *See* R. 34-28, PID 1049–50.

Shelton has many social-media accounts, all of which are public. At least some of those accounts depicted Shelton in his CMHA uniform. Shelton posted the above videos to his public YouTube channel. Although his YouTube channel does not

explicitly identify Shelton, his channel is "linked" to his other social-media pages. R. 34-1, PID 773–75.

Shelton was required to know and adhere to CMHA's policies and procedures, all of which were detailed in CMHA's "Rules and Regulations." R. 34-1, PID 575. These Rules and Regulations applied both when Shelton was on and off duty. Some of those Rules prohibited officers from violating any law; being "disrespectful or discourteous" to members of the public; or engaging in "any conduct, speech, or acts while . . . off duty that would . . . diminish the esteem of CMHA." R.34-34, PID 1058.

In "early" September 2020, Sergeant John Smiddy, Shelton's supervisor, "became aware of" the Head Shot video. R. 60-2, PID 2738. At some later point, Smiddy reported the video to Lieutenant Drew and Commander Thomas Burdyshaw. On the same day that Drew and Burdyshaw learned about the video, they reported it to Deputy Chief Victor McDowell. "A few days later," on September 18, 2020, during a regularly scheduled briefing conference, Drew and Burdyshaw asked Chief Gonzalez if he had been briefed about Shelton's videos. R. 36-1, PID 1129–31. Gonzalez then watched the Head Shot video, which he learned had also been circulating throughout the department. Later that day, Gonzalez "escalated the matter to [his] supervisor," Chief Executive Officer Jeffery K. Patterson, informing him of the "disturbing videos."

On that same day—September 18, 2020—at around 3:30 p.m., Shelton filed a workplace harassment complaint (the details of which are discussed in the next paragraphs) with HR Director

Betsy McCafferty. By that time, Gonzalez had already contacted Patterson about Shelton's video. Shelton's internal harassment complaint described twenty-four alleged incidents of racial discrimination.[1] Relevant here, Shelton complained that: Drew denied Shelton's request to leave the SWAT team; other officers were allowed to wear "Blue Lives Matter" facemasks, but Shelton was instructed not to wear a Black Lives Matter facemask; supervisors made offensive comments, such as "sometimes I don't think you know your place," and "OMG he is black." R. 34-19, PID 1016–20.

CMHA retained outside counsel to investigate Shelton's complaint. The investigation addressed each of the allegations in a seventeen-page report, finding twenty-three of the twenty four allegations unsubstantiated, but that an officer "may have" made the "OMG he is black" comment. R.38-1, PID 1299–1302. Aside from Shelton's testimony regarding some of the above allegations (i.e. officers' comments and the facemask policy), his briefs do not cite evidence beyond the allegations in his HR complaint.

On October 7, 2020, a few weeks after Shelton filed his HR complaint, CMHA placed him on paid administrative leave, pending an investigation into

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[1]Although Shelton's brief mentions that his HR complaint "detailed . . . how [Shelton] was disciplined and treated differently than other similarly situated CMHA employees because of his race," his briefing highlights only some of the HR complaint's allegations. *See* Appellant's Br. at 5–6.

alleged misconduct related to Shelton's videos. After a series of communications and meetings with Shelton, CMHA terminated Shelton's employment on January 29, 2021. The termination letter explained that Shelton violated CMHA's Policies and Procedures and Rules and Regulations when he posted "a series of videos of [him]self on YouTube which contain[ed] certain lyrics and depictions of violence, and lyrics that are derogatory and offensive to women and promote violence against women." R. 34-34, PID 1058. The letter then identified the five YouTube videos discussed above.

Shelton grieved his termination through his union on January 29, 2021, and filed an EEOC discrimination complaint on February 17, 2021. An arbitrator reviewed Shelton's grievance and eventually returned Shelton to work on November 28, 2022. The arbitrator reasoned that CMHA had failed to warn Shelton that his music could violate its policies, even though CMHA knew that Shelton rapped. It also noted that no members of the public had complained about the videos.

During these arbitration proceedings, in March 2022, Shelton learned that, before firing him, CMHA had retained outside legal counsel to evaluate some of Shelton's videos. Gonzalez testified in that arbitration proceeding that the review aimed to identify which videos were of personal interest and which touched on matters of public concern. Gonzalez further testified that he received a recommendation that he should "focus" his investigation on the five identified videos to determine whether those violated CMHA policies. R.

46-2, PID 1770. Shelton alleges that March 2022 was the first time he learned that outside counsel conducted what he calls a "First Amendment assessment." Appellant's Br. at 8.

II. PROCEDURAL HISTORY

Shelton filed his initial complaint on March 10, 2023, against CMHA and his supervisor, Lt. Drew. He filed a second amended complaint on August 21, 2023, against those same defendants. Shelton's second amended complaint enumerated the following claims:

> (I) 42 U.S.C. § 1983 First Amendment retaliation;
>
> (II) CMHA's Social Media Policy Suppresses Free Speech;
>
> (III) CMHA's Conduct Unbecoming Policy Suppresses Free Speech;
>
> (IV) 42 U.S.C. § 1983—Fourteenth Amendment Violation;
>
> (V) Tortious Interference with Employment Relations (only against Drew)
>
> (VI) Interference with Civil Rights Under Ohio Revised Code § 2921.45 and § 2307.60;
>
> (VII) Racial discrimination in violation of Title VII; and
>
> (VIII) Retaliation in violation of Title VII.

R.13.

In December 2023, CMHA moved for partial judgment on the pleadings, seeking dismissal of all claims except the Title VII claims against CMHA. The district court modified its scheduling order on April 4, 2024, and instructed the parties to "not delay

discovery until a ruling" on CMHA's motion. Discovery proceeded.

CMHA moved for summary judgment on all claims on June 28, 2024, and included four declarations. On August 9, 2024, Shelton moved to "disregard" the declarations for failing to comply with 28 U.S.C. § 1746,[2] arguing that the declarations were void because they excluded certain statutory language. R. 54. That same day, the district court ruled in a minute order that it would consider that objection only in a response to CMHA's motion for summary judgment. On August 29, 2024, CMHA filed its reply brief along with amended declarations.

The district court entered its final order on September 29, 2024, resolving the partial motion for judgment on the pleadings and the remaining claims on summary judgment. Relevant here, the district court held that counts I to IV were time-barred, and granted summary judgment in CMHA's favor on counts VII and VIII. This appeal followed, contesting only the decisions on counts I to IV and VII to VIII against CMHA. Shelton does not discuss the claims against Drew.

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[2]28 U.S.C. § 1746 permits a matter to be evidenced by a declaration if the declarant includes, "in substantially the following form," "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)." 28 U.S.C. § 1746.

III. ANALYSIS

A. Timeliness Dismissal

(1) *Accrual*

The district court dismissed counts I to IV as untimely under Federal Rule of Civil Procedure 12(c). This court reviews de novo that determination. *Berry v. Experian Info. Sols, Inc.*, 115 F.4th 528, 535 (6th Cir. 2024). In doing so, all well-pleaded material allegations in the complaint are taken as true and the court considers whether the moving party is nevertheless "clearly" entitled to judgment. *Jackson v. Pro. Radiology Inc.*, 864 F.3d 463, 466 (6th Cir. 2017).[3]

"The statute of limitations is an affirmative defense, and a plaintiff generally need not plead the lack of affirmative defenses to state a valid claim." *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012) (citations omitted). Accordingly, a Rule 12(c) motion, which considers only the pleadings, "is generally an inappropriate vehicle for dismissing a claim based upon the statute of limitations." *Id.* Sometimes, however, the allegations in the complaint "affirmatively show that the claim is time-barred." *Id.* "Because the statute of limitations is an affirmative defense, the burden is on the defendant to show that the statute of limitations has run." *Lutz v. Chesapeake Appalachia, L.L.C.*, 717 F.3d 459, 464

[3]Although the fact section above cites primarily from the summary judgment record, the complaint's allegations are accepted as true in deciding the timeliness question.

(6th Cir. 2013) (quoting *Campbell v. Grand Trunk W. R.R. Co.*, 238 F.3d 772, 775 (6th Cir. 2001)).

CMHA terminated Shelton's employment on January 29, 2021. He filed an EEOC complaint on February 17, 2021.[4] Shelton initially brought this suit on March 10, 2023. He brought his counts I to IV under § 1983, which does not provide a statute of limitations. See 28 U.S.C. § 1983. Instead, federal courts borrow the state's relevant personal injury statute of limitations—here two years. *Wallace v. Kato*, 549 U.S. 384, 387 (2007). Shelton concedes that Ohio's two-year statute of limitations applies here. So, absent a later accrual date or another doctrine, counts I to IV should be dismissed.

Federal law governs when a cause of action accrues. *Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir. 1984). Under the "standard" rule, a claim accrues when the plaintiff has "a complete and present cause of action." *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 201 (1997). "[A] cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Id.* That, in turn, depends "on the specific constitutional right alleged to have been infringed." *Reed v. Goertz*, 598 U.S. 230, 235–36 (2023).

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[4]The district court noted that the accrual date for Shelton's termination date could be as late as February 17, 2021. R. 61, PID 2811. That date still falls outside the statute of limitations, so for clarity we refer only to the January 29, 2021 date.

Shelton styles Count I as a First Amendment Retaliation (Viewpoint) claim. R. 13, PID 176.[5] A retaliation claim has three elements: (1) the plaintiff must have engaged in protected speech, (2) the state actor must have taken an "adverse" action, and (3) a "causal connection" must exist between these elements. *Rudd v. City of Norton Shores*, 977 F.3d 503, 513 (6th Cir. 2020). Shelton sometimes identifies his music as the protected speech, and other times identifies his HR harassment complaint. We assume without deciding that both were protected and that CMHA took the adverse action—termination—because of Shelton's protected speech. Applying the standard rule to these assumptions, Shelton had a "complete and present" cause of action when his employment was terminated on January 29, 2021 due to his protected speech. *See Reguli v. Russ*, 109 F.4th 874, 880–81 (6th Cir. 2024) (reasoning that the plaintiff had a "complete and present cause of action" when an officer unlawfully searched plaintiff's social media because the officer disliked plaintiff's speech). Thus, Shelton's lawsuit, filed more than two years later, would be time-barred under the occurrence rule.

The discovery rule delays accrual until a plaintiff "knows or has reason to know that they were injured and that the defendant caused their injury." *Snyder-Hill v. Ohio State Univ.*, 48 F.4th 686, 704

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[5]We agree with the district court that counts I to IV are materially identical for accrual purposes, all asserting injuries connected to either Shelton's HR complaint or his videos.

(6th Cir. 2022). The "causation inquiry" focuses on who caused the injury, not why they did so. *See Reguli*, 109 F.4th at 884. ("The cases incorporating a causation inquiry into the discovery rule have indicated that plaintiffs must have known of the defendant that caused their injury—not the defendant's subjective reasons for doing so.") (citation modified).

Here, CMHA terminated Shelton's employment on January 29, 2021. That day, Shelton immediately knew about the injury (termination) and who was responsible (CMHA). Indeed, CMHA even noted in the termination letter why it terminated Shelton's employment, explaining that five of Shelton's videos violated CMHA's policies. Moreover, Shelton's February 2021 EEOC complaint alleged that he was fired because of his workplace complaints and rap videos. Thus, under both the standard rule and the discovery rule, counts I to IV are time barred.

Shelton urges us to hold that counts I to IV did not accrue until March 2022, when he discovered during an arbitration hearing that CMHA conducted a "First Amendment assessment" of his videos. Shelton's conclusion rests on two flawed premises. First, he assumes that CMHA acted impermissibly in seeking legal advice to determine which of Shelton's many videos might constitute protected speech. *See* Appellant's Br. at 15 ("Without knowledge that CMHA had submitted all of his videos to an outside firm for First Amendment assessment, [Shelton] would have had no basis to bring a constitutional claim against CMHA."). But he does not explain how

that review violated the Constitution or why CMHA was obligated to disclose it. Moreover, even if the review was impermissible or otherwise evinced discriminatory/retaliatory intent, Shelton's assumption that his claim would not accrue until he discovered that review is incorrect.

Shelton correctly characterizes the discovery rule, but because he misconstrues the injury and causation analyses, his cited cases are inapposite. For example, Shelton relies on *Snyder-Hill v. Ohio State University*. In that case, adult plaintiffs alleged that a university physician abused them during medical appointments when they were teenagers or young adults. *See Snyder-Hill*, 48 F.4th at 691. "Most"—but not all—of the plaintiffs alleged that, for many years, they were unaware that the doctor's actions constituted abuse. *Id.* at 694. All of the plaintiffs, however, alleged that they could not have known about the university's responsibility, contending that they were unaware that other students had previously complained to the administration about the doctor's conduct. *Id.* This court concluded that the plaintiffs' claims did not accrue until the plaintiffs "kn[ew] or should have known that [university] administrators with authority to take corrective action knew of [the doctor's] conduct and failed to respond appropriately." *Id.* at 705.

Similarly, in *Ouellette v. Beaupre*, the plaintiff sued a police department and municipality, alleging that one of its officers sexually abused him and that the department and city bore responsibility. 977 F.3d 127, 130–31 (1st Cir. 2020). Although the

plaintiff reported the abuse around the time it occurred, he discovered only decades later that others had also experienced and reported similar abuse. *Id.* The First Circuit concluded that the plaintiff's claim against the department and city did not accrue until the plaintiff had "additional information suggesting that [the department and city] were also a cause of [the plaintiff's] injur[ies]." *Id.* at 140.

Shelton's case is not analogous. In both cases, and others Shelton cites, the discovery rule postponed the accrual date until the plaintiff discovered the injury (e.g. that a doctor's conduct factually constituted abuse) or learned that a particular defendant contributed to or caused the injury. Here, Shelton should have known about his injury and its cause as soon as CMHA terminated his employment, and certainly by the time he described these injuries in his EEOC complaint. At that point, he had all of the necessary information to challenge his termination in court. Shelton says that CMHA's First Amendment review constituted part of the injury and that therefore his claim did not accrue until he discovered the review. But he does not show how that review constitutes part of his injury or explain why anyone but CMHA bore responsibility for it. In any event, Shelton knew that the reason for his firing was his videos. If these videos were protected by the First Amendment, he needed no further information to pursue that claim. That CMHA sought to make that determination before firing him simply confirms that the firing was due to the videos, something Shelton should have known.

Thus, under either the standard rule or the discovery rule, Shelton's claims are time-barred.

(2) *Equitable Tolling*

To the extent the discovery rule bars counts I to IV, Shelton urges us to toll the statute of limitations. When reviewing § 1983 claims, federal courts generally look to the relevant state's equitable tolling rules. *Kato*, 549 U.S. at 395. Ohio courts employ the doctrine "to prohibit inequitable use of the statute of limitations in compelling cases which justify a departure from established procedure." *Lutz*, 717 F.3d at 474. A court may apply it "where there is some conduct of the adverse party, such as misrepresentation, which excludes suspicion and prevents inquiry." *Id*.

We agree with CMHA that Shelton forfeited this argument by failing to raise it below. None of his briefing in the district court discussed equitable tolling as distinct from the discovery rule. In any event, Shelton fails to identify any affirmative concealment or fraudulent misrepresentation by CMHA. He again argues, without support, that CMHA was required to disclose its First Amendment evaluation. But even assuming the point, Shelton provides no support for why such an omission entitles him to equitable tolling. We therefore decline to toll the statute of limitations, and affirm the district court's dismissal of counts I to IV as time-barred.

B. Title VII Claims

(1) *Declarations*

Shelton asserts that the district court erred in relying on CMHA's amended declarations, because the initial declarations violated 28 U.S.C. § 1746. This court reviews such evidentiary rulings for abuse of discretion. *Briggs v. Potter*, 463 F.3d 507, 511 (6th Cir. 2006). "A district court abuses its discretion when it relies on erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." *Aerel, S.R.L. v. PCC Airfoils, L.L.C.*, 448 F.3d 899, 906 (6th Cir. 2006).

Under 28 U.S.C. § 1746, a matter may be evidenced by a declaration if the declarant includes, "in *substantially* the following form," "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)." 28 U.S.C. § 1746. (emphasis added). In its motion for summary judgment, CMHA attached four declarations. R. 40-1–4. All four are signed and dated. *See id.* But in each the line above the signature reads, "SIGNED UNDER PENALTY OF PERJURY," omitting "I declare . . . that the foregoing is true and correct." *See id.*

CMHA "maintain[s] that the original declarations were proper and substantially" complied with § 1746's instructions. Appellees' Br. at 25. And our recent decision in *In re FirstEnergy Corp.* supports that argument. 154 F.4th 431, 439 (6th Cir. 2025). In that case, we held that a district court erred in refusing to consider a declaration that was

signed "'under penalty of perjury' without swearing it 'as true [and correct] under penalty of perjury.'" *Id.*

In any event, as the district court observed, a court has discretion to accept an amended affidavit. *See generally Collazos-Cruz v. United States*, No. 96-5452, 1997 WL 377037 (6th Cir. 1997) (per curiam) (unpublished) (finding that an amended declaration established a material fact and reversing summary judgment). In doing so here, the district court noted that CMHA "timely acted to cure the identified deficiency"; there were "no substantive differences between" the two sets of declarations; the amended declarations contained the relevant language; and CMHA submitted them before the court ruled on the summary judgment motion. R. 61, PID 2823. Under those circumstances—especially where the originals arguably comply with § 1746—we do not find that the district court abused its discretion in accepting the amended declarations.

(2) *Waiver/Forfeiture*

Shelton for the first time argues that a plaintiff should not need to satisfy the *McDonnell Douglas* framework, nor establish a prima facie case to survive summary judgment. CMHA argues that this court should not consider Shelton's argument because he raises it for the first time on appeal. CMHA relied on *McDonnell Douglas* in its summary judgment brief, and Shelton did not challenge that standard below. "Waiver is affirmative and intentional, whereas forfeiture is a more passive failure to make the timely assertion of a right." *Berkshire v. Dahl*, 928 F.3d 520, 530 (6th Cir. 2019) (citation modified). Shelton never "affirmatively abandoned" his

McDonnell Douglas objection; he merely failed to raise it. Shelton, therefore, forfeited the argument. *See id.* This court considers a forfeited argument only when doing otherwise "would produce a plain miscarriage of justice" or the case involves "exceptional circumstances." *Hayward v. Cleveland Clinic Found.*, 759 F.3d 601, 615 (6th Cir. 2014). Shelton has shown neither. We therefore decline to address his newly raised challenge to the *McDonnell Douglas* framework.

(3) *Summary Judgment*

This court reviews the grant of summary judgment de novo. *Lowe v. Walbro LLC*, 972 F.3d 827, 831 (6th Cir. 2020). Summary judgment is appropriate if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Saunders v. Ford Motor Co.*, 879 F.3d 742, 748 (6th Cir. 2018) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The moving party bears the burden of demonstrating that there is no genuine dispute of material fact. *Id.*

McDonnell Douglas established a tripartite framework for discrimination claims that are based on circumstantial evidence. First, a plaintiff must establish a prima facie case. *McNeal v. City of Blue Ash*, 117 F.4th 887, 896 (6th Cir. 2024). Second, if the plaintiff makes a prima facie case, the burden of production shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the adverse

action. *Id*. Third, if the defendant identifies a legitimate reason, the burden shifts back to the plaintiff to show that the defendant's reason was pretextual. *Id*.

We assume without deciding that Shelton made a prima facie case that he was terminated either for his race or in retaliation for filing a discrimination complaint. Both Title VII claims fail, however, because CMHA articulated a legitimate, nondiscriminatory reason for the termination, which Shelton did not adequately rebut. The Head Shot video depicts Shelton shooting an unarmed person. Another video shows Shelton brandishing a gun and holding a bottle of alcohol while sitting in the front seat of a car. His songs' lyrics are explicit and refer disparagingly to women. CMHA's policies barred this behavior, and Shelton conceded that those policies applied even when he was off-duty.

Shelton says that CMHA used his videos as a pretext to fire him for the HR complaint or for racially discriminatory motives, reasoning that CMHA long knew about his music. Though Shelton demonstrated that CMHA knew, for some time, that he rapped, he provides no evidence that it was aware of the specific videos at issue. Shelton's "bare assertion" that CMHA's proffered reason has no basis in fact is insufficient" to call it into question, and "fails to create a genuine issue of material fact." *Tingle v. Arbors at Hillard*, 692 F.3d 523, 531 (6th Cir. 2012). We therefore affirm the district court's decision to grant summary judgment on both Title VII claims.

CONCLUSION

For the reasons above, we **AFFIRM**.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM J. SHELTON,

Plaintiff — CASE NO. 1:23-cv-483

v. — JUDGE BRIDGET MEEHAN BRENNAN

CUYAHOGA METROPOLITAN, HOUSING AUTHORITY, *et al.*

Defendants

JUDGMENT ENTRY

For the reasons stated in this Court's Order, Defendants' motion for partial judgment on the pleadings (Doc. No. 19) is GRANTED in part and DENIED in part. Defendants' motion for summary judgment (Doc. No. 40) is GRANTED on the remaining claims pursuant to Rule 56 of the Federal Rules of Civil Procedure. Defendants' motions to exclude Plaintiff's experts (Doc. Nos. 22, 23) are DENIED as moot. This case is dismissed. IT IS SO ORDERED.

IT IS SO ORDERED

Date: September 27, 2024

s/Bridget M Brennan
BRIDGET MEEHAN BRENNAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM J. SHELTON,

Plaintiff — CASE NO. 1:23-cv-483

v. — JUDGE BRIDGET MEEHAN BRENNAN

CUYAHOGA METROPOLITAN, HOUSING AUTHORITY, *et al.*

Defendants

MEMORANDUM OPINION AND ORDER

Before the Court is Defendants' motion for partial judgment on the pleadings. (Doc. 19.) Plaintiff opposed the motion (Doc. 29), and Defendants replied (Doc. 31). Also fully briefed is Defendants' motion for summary judgment. (Docs. 40, 58, and 60.) For the reasons stated below, Defendants' motion for partial judgment on the pleadings is GRANTED in part and DENIED in part. Pursuant to Rule 56 of the Federal Rules of Civil Procedure, all remaining claims are summarily dismissed.

I. Motion for Partial Judgment on the Pleadings

A. Complaint Allegations

Plaintiff William J. Shelton[1]("Plaintiff or "Shelton") alleges the following facts in his Second Amended Complaint ("SAC"). (Doc. 13.) Plaintiff was a law enforcement officer employed by Defendant Cuyahoga Metropolitan Housing Authority ("CMHA"). (Id. ¶ 1.) CMHA hired him as a police officer in the CMHA Police Department ("CMHA PD") in February 2016. (Id. ¶ 8.) Plaintiff reported to Defendant Lieutenant Gregory Drew ("Lt. Drew"). (Id. ¶¶ 1, 4.) The CMHA PD employed approximately forty officers, the majority of whom were Caucasian, with between nine and ten African American officers. (Id. ¶ 12.) Plaintiff is African American. (Id. ¶ 8.)

Plaintiff was a detective in the Crime Suppression Unit of the CMHA PD. (Id. ¶ 16.) He also had a part-time assignment to the SWAT unit. (Id. ¶ 17.) Plaintiff's job duties included responding to calls for service; enforcing CMHA's safety and security policies and procedures; providing security anywhere in the CMHA estates; and working with law enforcement. (Id. ¶ 10.)

On October 4, 2019, Plaintiff submitted a written request to Field Operations Commander Thomas Burdyshaw ("Cmdr. Burdyshaw") to remove him from SWAT operations as soon as possible. (Id. ¶ 18; Doc. 13-3.) On October 9, 2019, Lt. Drew denied the request for several stated reasons

[1] Plaintiff's name is spelled differently in various filings. The Court will use the spelling stated in Shelton's SAC.

including: Plaintiff's advanced training and demonstration of the required skills and abilities; Plaintiff's past performance always exceeded Lt. Drew's expectations; being a member of the SWAT team complimented Plaintiff's assignment in the Crime Suppression Unit; the SWAT team was down two members; and Management Rights as outlined in the Collective Bargaining Agreement between CMHA and the FOP, OLC. (Doc. 15-1; see also Doc. 13 ¶¶ 18 20.) Lt. Drew's denial further stated, "I believe your continued participation as a member of the SWAT team is valuable and necessary." (Doc. 15-1.)

On July 10, 2020, Plaintiff again requested removal from the SWAT Unit in a letter to Crime Suppression Unit Sergeant John Smiddy ("Sgt. Smiddy"). (Doc. 13 ¶ 21; Doc. 13-4.) A month later, in August 2020, Lt. Drew summoned Plaintiff to a meeting in Sgt. Smiddy's office regarding the request to exit the SWAT team. (Doc. 13 ¶¶ 22-23.) Lt. Drew referred to Plaintiff's July 10, 2020 written request as a "mad, angry letter." (Id. ¶ 24.) Lt. Drew stated, "It doesn't look good when you write an angry memo because it sticks in your file and it's a battle you will not win." (Id. ¶ 25.) Shelton told Lt. Drew that he felt targeted and could feel the tensions in the department as the intended target. (Id. ¶ 27.) Lt. Drew stated he was not targeting Plaintiff and would let Plaintiff off the SWAT team in two months. (Id. ¶ 28.) Plaintiff alleges Lt. Drew's "response to Shelton's second request to be removed from SWAT operations in July 2020 was a pretextual ploy to complete his retaliatory targeting of Shelton." (Id. ¶ 29.)

On September 18, 2020, Shelton filed a written complaint with the CMHA Human Resources Department ("HR") alleging racial harassment. (Id. ¶¶ 30- 33; see also Doc. 13-5.) In his complaint, Plaintiff alleged Lt. Drew remarked "sometimes I don't think you know your place." (Doc. 13 ¶ 32.) Plaintiff also alleged discriminatory treatment on July 8, 2020, after Sgt. Smiddy told Plaintiff that Lt. Drew was upset because Plaintiff missed training. (Id.) Sgt. Smiddy conveyed Lt. Drew would mark Shelton AWOL if Shelton did not report to training immediately. (Id.) By contrast, when a Caucasian officer missed training, that officer was not threatened with AWOL. (Id.) Plaintiff also alleged CMHA PD Chief Andres Gonzalez ("Chief Gonzalez") prohibited Plaintiff from wearing "Black Lives Matter" face mask while on duty because it was a political message. (Id. ¶ 33.) CMHA PD changed its policy to require solid color masks without markings. (Id. ¶ 34.) Plaintiff claimed in July 2020, Caucasian officers wore masks with thin blue markings, which were out of department policy, but those officers were not "threatened, targeted, or harassed" like Plaintiff. (Id. ¶¶ 35-36.)

Plaintiff's SAC alleges Lt. Drew responded to Shelton's harassment complaint by targeting him for termination based upon Plaintiff's rap music videos. (Id. ¶¶ 37-38.) According to Plaintiff, on the same day Plaintiff submitted his workplace harassment complaint, on September 18, 2020, Lt. Drew searched the internet for Plaintiff's music video, "Head Shot." (Id. ¶ 38.) Lt. Drew, motivated by racial animus, showed that video to Chief Gonzalez. (Id. ¶¶ 39-42.)

Plaintiff acknowledges his "rap music could be classified as gangster rap with lyrics depicting violence or sexual themes," including the "Head Shot" video that "depicted a mock shooting of a homeless person and violence." (Id. ¶¶ 42, 61.) But Plaintiff alleges Defendants knew about his videos and never indicated a conflict with the videos and his position as a CMHA PD officer until after Shelton submitted his September 18, 2020 complaint. (Id. ¶¶ 43-60.)

On October 7, 2020, Chief Gonzalez placed Plaintiff on paid administrative leave. (Id. ¶ 65.) On January 27, 2021, Shelton participated in a pre-disciplinary conference. (See Doc. 16 at 240.)[2] Defendants asserted that Plaintiff's videos violated CMHA and CMHA PD policies and regulations. (See id.) Plaintiff alleges the conference was the first time Defendants informed him that his videos violated CMHA and CMHA PD policies. (Doc. 13 ¶¶ 57-58.)

On January 29, 2021, Defendants issued Shelton a termination letter. (Doc. 15 ¶ 66; Doc. 16 at 240.) That letter (which is an exhibit to Defendants' Answer) referenced the pre disciplinary conference and cited CMHA and CMHA PD personnel policies and rules and regulations. (Doc. 16.) The termination letter also listed five of Shelton's YouTube videos for violating the cited policies. (See id. at 242.)

In March 2022, Plaintiff and Defendants engaged in arbitration regarding Plaintiff's

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[2] For ease and consistency, record citations are to the electronically stamped CM/ECF document and PageID# rather than any internal pagination.

discharge. (Doc. 13 ¶ 72.) During arbitration, Shelton first learned that CMHA conducted a First Amendment assessment of his videos and determined that, aside from the five videos listed in the termination letter, most of them were protected by the First Amendment as addressing matters of public concern. (Id. ¶¶ 72, 77.) The details of CMHA's First Amendment assessment were not provided to Plaintiff in his termination hearing or termination notice. (Id. ¶ 73.) On September 22, 2022, Plaintiff was reinstated as a CMHA PD officer. (Id. ¶ 68.) Plaintiff's reinstatement included full backpay and benefits, but Plaintiff asserts that "Defendant CMHA in retaliation has refused to pay Shelton his full back pay award with overtime and interest." (Id. ¶¶ 69-71.)

Prior to his reinstatement, Plaintiff applied for other law enforcement positions. (Id. ¶ 78.) Plaintiff alleges he interviewed with the City of Timberlake ("Timberlake") in September 2021 but "has not been hired because of what Defendant CMHA [and Defendant Lt. Drew] reported to Timberlake's Chief of Police regarding Shelton's termination for rap video content." (Id. ¶¶ 79-80.) Similarly, Plaintiff alleges he was not hired by the City of Bedford Heights ("Bedford Heights") in August 2022 because of what CMHA and Lt. Drew reported to them. (Id. ¶¶ 81-82.) "At Bedford [Height]'s police roll call, its commander showed the roll call participants Shelton's 'HeadShot' YouTube video." (Id. ¶ 81.)

"Upon information and belief, Defendant Drew informed Shelton's prospective employers, and other individuals he knew, about Shelton's rap videos and

his termination by Defendant CMHA." (Id. ¶ 88.) Plaintiff alleges Lt. Drew's statements to Plaintiff's prospective employers were not authorized by CMHA and were made in retaliation for Plaintiff's workplace complaints. (Id. ¶¶ 92-97.) Plaintiff further alleges Lt. Drew's statements prevented him from obtaining another public employment position in violation of the First and Fourteenth Amendments and Ohio law. (See id. ¶ 105.)

Plaintiff asserts four federal constitutional claims, two state law claims, and two federal statutory claims under Title VII. In Count One, Plaintiff alleges viewpoint discrimination and retaliation under the First Amendment. (Id. ¶¶ 106-36.) In Count Two, Plaintiff challenges CMHA's social media policy and related CMHA PD regulations as violating the First Amendment. (Id. ¶¶ 137-40.) In Count Three, Plaintiff challenges CMHA's Conduct Unbecoming Policy and related CMHA PD regulations as violating the First Amendment. (Id. ¶¶ 141-44.) In Count Four, Plaintiff alleges violations of the Fourteenth Amendment. (Id. ¶¶ 145-52.) In Count Five, Plaintiff alleges tortious interference with prospective employers against Lt. Drew. (Id. ¶¶ 153-59.) In Count Six, Plaintiff alleges violations of § 2921.45 and § 2307.60 of the Ohio Revised Code. (Id. ¶¶ 160-65.) In Count Seven, Plaintiff alleges racial discrimination in violation of Title VII, 42 U.S.C. § 2000e-2. (Id. ¶¶ 166-72.) In Count Eight, Plaintiff alleges retaliation prohibited by Title VII, 42 U.S.C. § 2000e-3(a). (Id. ¶¶ 173-84.)

Defendants move for dismissal and judgment as a matter of law on Counts One through Six and certain portions of Counts Seven and Eight. (Doc. 19 at 247.)

B. Law and Analysis

1. Standard of Review

Pursuant to Federal Rule of Civil Procedure 12(c), "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). A motion under Rule 12(c) is reviewed under the same standard as a Rule 12(b)(6) motion to dismiss. See Ziegler v. IBP Hog Mkt., Inc., 249 F.3d 509, 511-12 (6th Cir. 2001) (citing Mixon v. Ohio, 193 F.3d 389, 399-400 (6th Cir. 1999)).

"For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." Jackson v. Pro. Radiology Inc., 864 F.3d 463, 466 (6th Cir. 2017) (quoting S. Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 479 F.2d 478, 480 (6th Cir. 1973)). A complaint must give notice of what the legal claims are and the factual grounds upon which they rest. Bassett v. Nat'l Collegiate Athletic Ass'n, 528 F.3d 426, 437 (6th Cir. 2008); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A Rule 12(c) motion "is granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." Paskvan v. City of Cleveland Civil Serv. Comm'n, 946 F.2d 1233, 1235 (6th Cir. 1991). The "complaint

must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Engler v. Arnold, 862 F.3d 571, 575 (6th Cir. 2017) (quoting Iqbal, 556 U.S. at 678). "[D]ocuments attached to the pleadings become part of the pleadings and may be considered . . . In addition, when a document is referred to in the pleadings and is integral to the claims, it may be considered." Commercial Money Ctr., Inc. v. Illinois Union Ins. Co., 508 F.3d 327, 335-36 (6th Cir. 2007) (citing Fed. R. Civ. P. 10(c)).

If a plaintiff pleads facts that reveal a flaw in the claim or substantiate a defense, he may plead himself out of federal court. In other words, "sometimes the allegations in the complaint affirmatively show that the claim is [deficient or disallowed as a matter of law]. When that is the case . . . dismissing the claim . . . is appropriate." Cataldo v. U.S. Steel Corp., 676 F.3d 542, 547 (6th Cir. 2012); see also Riverview Health Inst. LLC v. Med. Mut. of Ohio, 601 F.3d 505, 512 (6th Cir. 2010) (motion to dismiss will be granted "if the claim shows on its face that relief is barred by an affirmative defense").

2. Federal Constitutional Claims

Defendants move to dismiss Plaintiff's First and Fourteenth Amendment claims (Counts One through Four) as time-barred. (Doc. 19 at 251-52.) "The obligation to plead facts in avoidance of the statute of limitations defense is triggered [where] 'it is apparent from the face of the complaint that the time limit for bringing the claim[s] has passed.'" Bishop v. Lucent Techs., Inc., 520 F.3d 516, 520 (6th Cir. 2008) (quoting Hoover v. Langston Equip.

Assocs., Inc., 958 F.2d 742, 744 (6th Cir. 1992)). "[T]he plaintiff cannot 'escape the statute by saying nothing'" or by relying on the general rule that inferences on a Rule 12 motion run in a plaintiff's favor. Id.

"Actions brought pursuant to 42 U.S.C. § 1983 apply the statute of limitations from a state's general personal injury statute." Trzebuckowski v. City of Cleveland, 319 F.3d 853, 855 56 (6th Cir. 2003); see also Owens v. Okure, 488 U.S. 235, 240-41 (1989) ("Because § 1983 claims are best characterized as personal injury actions, we held that a State's personal injury statute of limitations should be applied to all § 1983 claims.") The two-year limitations period applies in the First Amendment and retaliation context. See, e.g., Khatri v. Ohio State Univ., No. 5:18-cv-02962, 2021 WL 534904, at *8 (N.D. Ohio Feb. 12, 2021), aff'd, No. 21-3193, 2022 WL 620147 (6th Cir. Jan. 25, 2022); Oko v. City of Cleveland, No. 1:21-cv-2222, 2023 WL 4405270, at *6 (N.D. Ohio July 7, 2023) (collecting cases).

a. Accrual and the Discovery Rule

Federal law determines when a § 1983 claim accrues. Wallace v. Kato, 549 U.S. 384, 388 (2007). The claim "accrues when the plaintiff knows or has reason to know of the injury which is the basis of his action." Johnson v. Memphis Light Gas & Water Div., 777 F.3d 838, 843 (6th Cir. 2015) (citations and quotations omitted). "A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence." Id. "In

this objective inquiry, courts look to what event should have alerted the typical lay person to protect his or her rights." Id.

The parties here agree the correct limitations period is two years for the § 1983 claims, but they disagree when Plaintiff's claims accrued, i.e., when the two-year limitations period began to run. (Doc. 19 at 251-52; Doc. 29 at 447-51.) Defendants argue "the incident giving rise to Plaintiff's claims accrued no later than January 29, 2021, the date of Plaintiff's termination. Consequently, Plaintiff had until January 29, 2023, to file a § 1983 claim. Plaintiff, however, did not file his original Complaint in this matter until March 10, 2023." (Doc. 19 at 252.)

Plaintiff responds that his § 1983 claims are timely under the discovery rule. (Doc. 29 at 447-51.) Plaintiff asserts, "Because Shelton lacked knowledge of Defendant CMHA's First Amendment assessment of his YouTube videos, why his job applications were denied or the cause of his injury, there is at a minimum a question of fact as to the exact date of accrual of his constitutional infringement claim." (Id. at 448.) Plaintiff also argues Defendants' motion should be denied because "Defendants assume that Shelton knew at the time of his termination that Drew or anyone else caused his injury. However, nothing in the Complaint conclusively establishes when this claim accrued and Shelton was not required to plead this information in his Complaint." (Doc. 29 at 453.)

On reply, Defendants acknowledge "there appears to be some debate between the United States Supreme Court and the Sixth Circuit regarding the

appropriate accrual analysis in the Section 1983 context[.]" (Doc. 31 at 479.) But they further argue "Plaintiff's Section 1983 claims are time-barred under both the standard accrual rule and the discovery rule." (Id.) Under the standard accrual rule, they assert Plaintiff had a complete and present cause of action when Plaintiff was terminated—on January 29, 2021. (Id.) Likewise, under the discovery rule, Plaintiff knew or had reason to know of the injury when he was terminated through the exercise of reasonable diligence. (Id.) Defendants point to the January 29, 2021 termination letter, which "clearly states that Plaintiff's employment was being terminated for posting five specific videos of himself on YouTube which contain certain lyrics and depictions of violence, and lyrics that are derogatory and offensive to women and promote violence against women." (Id.)

"As a general matter, the statute of limitations begins to run when the plaintiff has a 'complete and present cause of action.'" Reed v. Goertz, 598 U.S. 230, 235-36 (2023) (quoting Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., 522 U.S. 192, 201 (1997)). The Sixth Circuit recently confirmed that in § 1983 cases, "plaintiffs can plead themselves out of court on statute-of-limitations grounds if the complaint alleges facts showing that they did not sue in time." Reguli v. Russ, 109 F.4th 874, 879 (6th Cir. 2024) (discussing accrual of a First Amendment retaliation claim). The Sixth Circuit acknowledged some of its past decisions sent "mixed messages" regarding the discovery rule in § 1983 claims by holding in some cases, the discovery rule

starts the limitations period when the plaintiff knew of the injury, and holding in others accrual begins when the plaintiff knew both his injury and the cause of that injury. Id. at 882-83. The Sixth Circuit held, "Under either approach to the discovery rule, our cases leave no doubt that a statute of limitations can start to run even if a § 1983 plaintiff lacks knowledge of every element of the claim." Id. at 883 (emphasis in original). "Courts universally recognize that the discovery rule begins once a plaintiff learns of an injury from the defendant's conduct—even if the plaintiff does not discover the full extent of the injury until later." Id. (emphasis in original) (citation omitted). "[W]e tie the discovery rule to the date that [plaintiff] learned of [defendant's] adverse action—not the date [plaintiff] learned of [defendant's] motive for this action." Id. at 884 (citation omitted).

b. First Amendment Claims

In Count One, Plaintiff alleges "Defendants, in their act of terminating Shelton, engaged in unconstitutional viewpoint discrimination because their actions were substantially motivated by their disapproval of Shelton's speech content." (Doc. 13 ¶ 117 (emphasis added).) Count One also characterizes that termination as prohibited First Amendment retaliation. (Id. ¶ 112.) In Counts Two and Three, Plaintiff alleges certain policies CMHA relied upon when terminating Plaintiff, the Social Media Policy, the Conduct Unbecoming Policy, and related CMHA PD regulations, violate the First Amendment. (See id. at 179, 181-82.)

"Whether a plaintiff has a complete and present cause of action under § 1983 turns on the specific constitutional right at issue." Reguli, 109 F.4th at 880 (citation omitted). A First Amendment retaliation claim has three elements:

> First, the plaintiff must have engaged in speech that the First Amendment protects . . . . Second, the state actor must have taken an "adverse" (that is, harmful) action against the plaintiff—such as . . . dismissal from governmental employment. Third, a "causal connection" must exist between these elements—such that the protected speech motivated (indeed, qualified as a but-for cause of) the adverse action.

Id. (citations omitted).

Plaintiff alleges his rap videos are protected speech, Defendants took an adverse action in terminating his employment, and there was a causal connection between his protected speech and termination. (Doc. 13 ¶¶ 108-20.) Plaintiff also alleges he learned Defendants determined his rap videos violated CMHA and CMHA PD policies at his pre-disciplinary conference, and they terminated him on January 29, 2021 "for the content of his rap videos." (Id. ¶¶ 57-58, 66.) Plaintiff therefore had a complete and present First Amendment retaliation claim by the end of January 2021.

To the extent Plaintiff claims his workplace harassment complaint motivated his termination, Plaintiff knew of his injury no later than February 17, 2021. Plaintiff attached as Exhibit A to his SAC

the EEOC charge of discrimination he filed on February 17, 2021, in which he attested:

> I filed a workplace harassment complaint with Human Resources on September 18, 2020 naming specific individuals within the chain of command. Chief Andre Gonzalez placed me on administrative due to the information Lt. Drew gave him regarding my rap video on September 18. On January 29, 2021, I was informed that my rap video on YouTube was controversial and I was discharged.

(Doc. 13-1 at 190.) Plaintiff therefore knew of his injury (the January 29, 2021 termination) and the alleged causal connection between his harassment complaint and injury when he made the February 17, 2021 charge. (Id.) Even under Plaintiff's view of the discovery rule, Plaintiff's First Amendment claims in Count One accrued at the latest by February 17, 2021, and the limitations period expired by February 17, 2023.

The same result follows for Counts Two and Three, where Plaintiff claims certain policies CMHA cited as the basis for his termination violate the First Amendment. The injury is the same: Plaintiff's termination on January 29, 2021. Again, even if the discovery rule applies to Counts Two and Three, it does not change the result. Plaintiff pleaded at his pre-disciplinary conference, he learned of CMHA's position that his rap videos violated CMHA and CMHA PD policies. (See Doc. 13 ¶¶ 57-58.) Once CMHA terminated Plaintiff because of those polices

on January 29, 2021, and cited those polices in the termination letter, Plaintiff's First Amendment claims challenging those policies accrued. (See id. ¶ 66; Doc. 16.) And as discussed above, Plaintiff's EEOC charge indicates he had notice of the alleged injury by February 17, 2021 at the latest. The two-year limitations period already expired before Plaintiff filed suit in this Court on March 10, 2023. For these reasons, Defendants' motion for judgment on the pleadings as a matter of law on Counts One through Three is granted.

c. Fourteenth Amendment Claim

Plaintiff also asserts Defendants' adverse actions "depriv[ed] him of his liberty under the Fourteenth Amendment." (Doc. 13 ¶ 149.) Plaintiff alleges Defendants retaliated against Plaintiff for complaining of discriminatory treatment, and the adverse action, his termination, "was based upon vague and overbroad personnel policies." (Id. ¶¶ 147-48.) Again, CMHA cited the policies at issue in the January 29, 2021 termination letter. (Doc. 16.)

Because the alleged adverse actions and injury in Count Four are the same as those alleged in Counts One through Three, the accrual date is the same. Plaintiff's Fourteenth Amendment claim accrued by January 29, 2021—or, at the latest, by February 17, 2021. In either case, the limitations period expired prior to Plaintiff filing suit in this Court on March 10, 2023. Defendants' motion for judgment on the pleadings as a matter of law on Count Four is granted.

3. Tortious Interference with Employment Relations – Lt. Drew

Count Five alleges Lt. Drew "intentionally interfered with [Plaintiff's] prospective employment relations." (Doc. 13 ¶ 156.) Plaintiff contends Lt. Drew intentionally and willfully tried "to cause damages to [Plaintiff] in his pursuit of employment" with Beford Heights and Timberlake, and Lt. Drew "was not privileged" when he "communicated false light information" regarding Plaintiff to his prospective employers. (Id. ¶¶ 154-59.)

The statute of limitations for a claim of tortious interference is four years under Ohio law. See Ohio Rev. Code § 2305.09(D); Smith v. Nat'l W. Life, 2017-Ohio-4184, ¶ 11, 92 N.E.3d 169, 173. Under some circumstances, Ohio courts determine that the true bases for a claim or nature of the relief sought will warrant the application of a different statutory limitations period. See Smith, 92 N.E.3d at 173 (citing cases). For example, Ohio courts have held that "if a defamation claim fails on the statute of limitations, so too must a tortious interference claim based on the same conduct as the defamation claim." Id.

Lt. Drew unpersuasively argues Count Five should be characterized as a claim for defamation or false light invasion of privacy—for which the limitations period is only one year under Ohio law—for the following reasons. (Doc. 19 at 253.) First, Plaintiff expressly disavows he is pursuing a legal theory for false light invasion of privacy or defamation. (Doc. 29 at 455.)

Second, the SAC as pleaded is incompatible with those torts. Plaintiff alleges he put his music videos onto public social media. (Doc. 13 ¶¶ 45, 63.) Plaintiff does not allege Lt. Drew spread false information about him, but rather Lt. Drew spread negative information about him. (Id. ¶¶ 87-89.) The SAC alleges Lt. Drew interfered with Plaintiff's prospective employment opportunities by conveying to those employers that Plaintiff's rap videos (on public platforms) were the basis for his termination; the SAC does not allege Lt. Drew made defamatory statements or invaded his privacy. (Id. ¶¶ 87-96, 154-59.) Count Five is therefore governed by a four-year limitations period, so this claim is timely. Lt. Drew's motion for judgment on Count Five on statute of limitations grounds is denied.

To state a claim for tortious interference with employment relations, a plaintiff must allege: "(1) the existence of an employment relationship between plaintiff and the employer; (2) the defendant was aware of this relationship; (3) the defendant intentionally interfered with this relationship; and (4) the plaintiff was injured as a proximate result of the defendant's acts." Gerace v. Biotheranostics, Inc., 2022-Ohio-302, ¶ 36, 184 N.E.3d 915, 923 (citation omitted); see also Hustler Cincinnati, Inc. v. Cambria, 625 Fed. App'x 712, 720 (6th Cir. 2015).

Lt. Drew argues this claim is substantively deficient under Ohio law because Plaintiff did not have an employment relationship with the alleged prospective employers. (See Doc. 19 at 257; Doc. 31 at 482-83.) Even if submitting an employment application to a prospective employer does not

constitute an employment relationship, Ohio law also recognizes the tort of tortious interference with business relationships. Ginn v. Stonecreek Dental Care, 2015-Ohio 1600, ¶ 11, 30 N.E.3d 1034, 1039. And "interference with a business relationship includes intentional interference with prospective contractual relations, not yet reduced to a contract." Id. at 1040 (quotations and citations omitted).

Here, Plaintiff alleges he applied and interviewed for police officer positions with Timberlake and Bedford Heights (Doc. 13 ¶¶ 79, 81, 85); Lt. Drew was aware of Plaintiff's applications with those prospective employers (id. ¶¶ 80, 82, 155); Lt. Drew intentionally interfered with Plaintiff's prospective employment by informing Timberlake and Bedford Heights about Plaintiff's rap video and his termination by CMHA, and by repeating negative statements about Plaintiff to prevent him from being hired (id. ¶¶ 80, 82, 87-97, 154, 156); and Plaintiff was damaged by not being hired (id. ¶¶ 98-105, 157). Plaintiff plausibly pleaded a claim for tortious interference with business relationships. For these reasons, Lt. Drew's motion for judgment as a matter of law on Count Five is denied.

4. Civil Liability

In Count Six, Plaintiff alleges Defendants knowingly deprived Plaintiff of his constitutional and statutory rights under Ohio Revised Code § 2921.45 and § 2307.60. Under § 2921.45(A), "No public servant, under color of the public servant's office, employment, or authority, shall knowingly deprive, or conspire or attempt to deprive any person of a constitutional or statutory right." A violation of this

section is a misdemeanor criminal offense. Section 2307.60 recognizes a civil cause of action for violations of § 2921.45. Jacobson v. Kaforey, 2016-Ohio-8434, ¶ 10, 149 Ohio St. 3d 398, 400 (Section 2307.60 "creates a civil cause of action for damages resulting from any criminal act.").

As an initial matter, Plaintiff alleges "Defendants CMHA, and Defendant Drew are public servants" under § 2921.45. (Doc. 13 ¶¶ 161, 163.) This statement is simply a legal conclusion.[3] And from the face of the statute, Plaintiff's assertion as to CMHA is incorrect.[4]

A "public servant" is "(1) Any public official; (2) Any person performing ad hoc a governmental function, including, but not limited to, a juror, member of a temporary commission, master, arbitrator, advisor, or consultant; (3) A person who is a candidate for public office. . . ." Ohio Rev. Code § 2921.01(B). A "public official" is "any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity, and includes, but is not limited to, legislators, judges, and law enforcement officers .

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[3] "In determining whether a plaintiff has stated a plausible claim for relief . . . the presumption of truth is inapplicable to legal conclusions." *Ogbonna-McGruder v. Austin Peay State Univ.*, 91 F.4th 833, 839 (6th Cir. 2024) (citations omitted), *cert. denied*, 144 S. Ct. 2689 (2024).

[4] CMHA is a political subdivision of the state. *See* 1987 Ohio Op. Att'y Gen. No. 87-019 (Ohio A.G.), 1987 WL 290010 (Apr. 2, 1987).

. . ." Id. § 2921.01(A). CMHA plainly does not meet the statutory definition of "public servant." Thus, CMHA is entitled to judgment as a matter of law on Count Six.

Section 2921.45 applies differently to Lt. Drew. As an employee of a government entity, Lt. Drew meets the statutory definition of a public servant for purposes of § 2921.45. See id. § 2921.01. As such, he may be subject to civil liability for any violation of § 2921.45.

Defendants assert Count Six is barred by a one-year limitations period. (Doc. 19 at 257.) See Ohio Rev. Code § 2305.11(A) ("[A]n action upon a statute for a penalty or forfeiture shall be commenced within one year after the cause of action accrued."); see also Brack v. Budish, 539 F. Supp. 3d 794, 800-01 (N.D. Ohio 2021) (holding the one-year period applies to § 2307.60); Marquardt v. Carlton, No. 1:18-cv-333, 2019 WL 1491966, at *2-3 (N.D. Ohio Apr. 2, 2019) (same). To Defendants, "case law in this Circuit overwhelmingly applies a one-year statute of limitation." (Doc. 31 at 483.)

Plaintiff counters that § 2307.60 is remedial and for the benefit of a crime victim, which makes it subject to a six-year limitations period. (Doc. 29 at 457-58.) See Ohio Rev. Code § 2305.07(B) ("An action upon a liability created by statute other than a forfeiture or penalty shall be brought within six years after the cause of action accrued."). Plaintiff cites to a recent trend following the Ohio Court of Appeals in Harris v. Cunix, 2022-Ohio-839, ¶ 36, 187 N.E.3d 582, 593, which concluded § 2307.60 is remedial, not penal.

Ultimately, dismissal at the pleading stage is only appropriate when the statute of limitations defect is apparent from the face of the complaint. See Hoover v. Langston Equip. Assocs., Inc., 958 F.2d 742, 744 (6th Cir. 1992); Alston v. Tenn. Dep't of Corr., 28 F. App'x 475, 476 (6th Cir. 2002). Defendants have not established Lt. Drew is entitled to judgment as a matter of law on Count Six.

5. Title VII Claims – Lt. Drew

In Counts Seven and Eight, Plaintiff alleges Defendants engaged in racial discrimination and retaliated against him for submitting his workplace complaint in violation of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-2 and -3. Plaintiff alleges Lt. Drew is liable in both his official capacity and individual capacity. (See Doc. No 13 ¶ 4.) Defendants move to dismiss these counts as to Lt. Drew. (Doc. 19 at 258.)

Plaintiff acknowledges Title VII actions may not be brought against individual employees in their personal capacities. (See Doc. 29 at 459 (citing Wathen v. Gen. Elec. Co., 115 F.3d 400, 405 (6th Cir. 1997)); see also Fisher v. Merryman, 32 F. App'x 721, 723 (6th Cir. 2002).) However, Plaintiff asserts Lt. Drew is liable under Title VII in his official capacity under an alter ego theory. (Doc. 29 at 459-60 (citing Mitchell v. Fujitec Am., Inc., 518 F. Supp. 3d 1073, 1101 (S.D. Ohio 2021)).) In Mitchell, the court noted "'there is support for the proposition that a supervisor may be held liable in his or her official capacity upon a showing that he or she could be considered the 'alter ego' of the employer,' although the Sixth Circuit has not definitively ruled on the issue." 518 F. Supp.

3d at 1100 (citing Little v. BP Expl. & Oil Co., 265 F.3d 357, 362 n.2 (6th Cir. 2001)). To hold a supervisor liable under this alter ego theory, a plaintiff has to show the supervisor had significant control over the plaintiff's hiring, firing, and working conditions. See Little, 265 F.3d at 362 n.2; Johnson v. Johnson, No. 1:11 CV 2530, 2012 WL 1571531, at *2 (N.D. Ohio Apr. 30, 2012). Plaintiff asserts the SAC adequately alleges Lt. Drew was Plaintiff's supervisor and was in control of Plaintiff's terms and conditions of employment. (Doc. 29 at 459-60.)

Defendants respond that even if Plaintiff could state Title VII claims against Lt. Drew in his official capacity, those claims should be dismissed as redundant and duplicative of the Title VII claims against CMHA.[5] (Doc. 19 at 258; Doc. 31 at 484.) "While not required, dismissal of the redundant claim is permissible." Kunkle v. Strickland, No. 1:09 CV 1760, 2009 WL 10714757, at *5 (N.D. Ohio Dec. 10, 2009). In fact, courts in the Sixth Circuit "regularly dismiss as redundant claims against agents in their official capacities when the principal entity is also named as a defendant in the suit." Carter v. Delaware Cnty. Bd. of Comm'rs, No. 2:07-CV 1189, 2009 WL 544907, at *14 (S.D. Ohio Mar. 3, 2009); see also Von Herbert v. City of St. Clair Shores, 61 Fed. App'x 133, 140 n.4 (6th Cir. 2003) ("[plaintiff's] official-capacity federal claims against [individual

[5] Except for certain portions of Count 8 discussed below, CMHA does not move for judgment on the pleadings on these counts and Defendants address these claims on summary judgment. (*See* Doc. 19 at 250 n.3.)

defendants] were redundant because they were subsumed by her § 1983 charge against city"); Smith v. Bd. of Trustees Lakeland Cmty. Coll., 746 F. Supp. 2d 877, 892 n.12 (N.D. Ohio 2010) (noting that courts regularly dismiss claims against agents in their official capacities when the principal entity is also a named defendant); Kunkle, 2009 WL 10714757, at *5 (dismissing the official capacity claims against the individual employee as duplicative of the claims against the employer); Pethtel v. Washington Cnty. Sheriff's Off., No. 2:06-cv-799, 2007 WL 2359765, *5 (S.D. Ohio Aug.16, 2007) (dismissing claims against the county defendants in their official capacities as redundant where county had been named a defendant); Gray v. City of Cincinnati, No. 1:03-cv-119, 2006 WL 2193187, *8 (S.D. Ohio Aug.1, 2006) (granting summary judgment on official capacity claims because they were redundant).

In fact, in Mitchell, the very case Plaintiff relies on to assert an "alter ego" official capacity claim against Lt. Drew (Doc. 29 at 459-60), the court dismissed the official capacity claim against the individual CEO defendant as "redundant and duplicative" of the Title VII claims against the corporate employer. 518 F. Supp. 3d at 1101; see also Maudlin v. Inside Out Inc., No. 3:13-CV-00354-TMR, 2014 WL 1342883, at *3 (S.D. Ohio Apr. 3, 2014) (dismissing the official capacity suit as "redundant and duplicative of the suit against [the employer]"). The Mitchell court reasoned, "[t]he employer and only the employer can be held responsible for any relief the employee obtains, even if under the official capacity theory. Thus, when an employee has

already sued a corporate employer under Title VII, an official capacity suit against a supervisor adds nothing to the litigation." 518 F. Supp. 3d at 1101 (citations and quotations omitted); see also Monsul v. Ohashi Technica U.S.A., Inc., No. 2:08-CV-958, 2009 WL 2430959, at *3 (S.D. Ohio Aug. 6, 2009) (dismissing the "unnecessary" official capacity claims against the individual defendants as "wholly duplicative of the Title VII claims against [the employer] and add nothing to this litigation"). Here, where CMHA would still be liable for any relief Plaintiff obtains on the Title VII claims against Lt. Drew, the official capacity claims are redundant and duplicative of the Title VII claims against CMHA and add nothing to the litigation.[6] For these reasons, Lt. Drew is entitled to judgment as a matter of law on Counts Seven and Eight in both his individual and official capacity.

6. Back Pay Allegations

Defendants argue Count 8 is, in part, preempted and otherwise fails to state a claim. (Doc. 19 at 258-60.) In Count 8, Plaintiff alleges a

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[6] Plaintiff also failed to address Defendants' argument that the official capacity claims against Lt. Drew should be dismissed as redundant and duplicative. (Doc. 30 at 474-75.) Thus, Plaintiff effectively conceded this point. *USA Parking Sys., LLC v. E. Gateway Cmty. Coll.*, No. 4:20CV1967, 2022 WL 312230, at *5 (N.D. Ohio Feb. 1, 2022), *aff'd*, No. 22-3523, 2023 WL 8811690 (6th Cir. Dec. 20, 2023) ("Where a party fails to respond to an argument in a motion to dismiss the Court assumes he concedes this point and abandons the claim.") (citing *ARJN #3 v. Cooper*, 517 F. Supp.3d 732, 750 (M.D. Tenn. 2021) (quotations omitted)).

retaliation theory premised on the refusal to pay all back pay with interest and overtime after his reinstatement. (Doc. 13 ¶ 180.) Defendants argue this portion of Count 8 fails for three reasons: (1) any issues related to back pay amount to a claim under Ohio Rev. Code § 4112.02, which are exclusively governed by the parties' collective bargaining agreement and are therefore preempted under § 4117; (2) Plaintiff failed to exhaust his administrative remedies as it relates to his back pay allegations; and (3) Plaintiff's back pay allegations fail to establish a prima facie case of retaliation and fail to meet applicable pleading standards. (Doc. 19 at 258-60.)

Plaintiff responds that he does not refer to or incorporate § 4112.02 claims in Count 8, so Plaintiff has not intertwined his claims with any collective bargaining agreement. (Doc. 29 at 460.) Plaintiff asserts that the factual allegations regarding back pay "are set forth only to support Shelton's claim of continuing retaliation by Defendant CMHA."[7] (Id.)

Defendants do not specify why Plaintiff's retaliation allegations related to back pay invoke his contractual rights under the collective bargaining agreement, and how the claim impermissibly

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[7] On reply, Defendants assert Plaintiff's response fails to address all of Defendants' arguments on Count 8, so Plaintiff effectively conceded these points and abandoned this portion of the claim. (Doc. 31 at 485.) The Court disagrees. Plaintiff disavows he is seeking the relief Defendants argue is (1) preempted, (2) non-exhausted, (3) and fails to state a claim. (Doc. 29 at 460.) Plaintiff has adequately responded to Defendants' arguments at this stage.

intertwines § 4112.02 with the agreement and remedies Plaintiff seeks under Title VII, a federal statute. Plaintiff argues Defendants' alleged refusal to pay him the full amount of back pay supports his Title VII statutory claim of retaliation—Defendants have failed to show why the existence of a collective bargaining agreement would prevent him from making such allegations in support of his Title VII rights. See generally Smith v. Bd. of Trs. Lakeland Cmty. Coll., 746 F. Supp. 2d 877, 897 (N.D. Ohio 2010) ("The existence of a collective bargaining agreement does not prevent an employee from filing and prosecuting claims under federal or state statutes. While an employee's contractual rights under the collective bargaining agreement are subject solely to the grievance procedure contained therein, his statutory rights are not.") (quotations and citations omitted). Here, Defendants have not proven this portion of the claim— as pleaded—results in dismissal as a matter of law.

Additionally, Defendants assert Plaintiff's back pay allegations are insufficient to establish a prima facie case of retaliation and run afoul of pleading standards. (Doc. 19 at 260.) This argument is not well taken. In Count 8, Plaintiff alleges after he opposed Defendants' racially discriminatory practices, Defendants retaliated against him in several ways,

> including but not limited to: heightened scrutiny on the basis of race; unequal application of work mask rules favoring Caucasians but not African-Americans;

> pretextually initiating an investigation of Shelton's rap videos after he made his complaints; and, proceeding to terminate Shelton without any resident or staff complaints; terminating Shelton without informing him that his rap videos could subject him to discipline; and, continuing to refuse to pay Shelton all his over twenty months (20) of back pay with interest and overtime.

(Doc. 13 ¶ 180.) Defendants isolate three allegations related to Plaintiff's back pay and claim those allegations alone fail to state a claim for retaliation. (Doc. 19 at 260.) But as Plaintiff contends, and the SAC demonstrates, the allegations regarding back pay are just one example of alleged retaliatory conduct. At this stage, Plaintiff's allegations, taken as a whole, contain sufficient factual matter, accepted as true, to state a retaliation claim that is plausible on its face. See Engler, 862 F.3d at 575 (quoting Iqbal, 556 U.S. at 678). Defendants' motion with respect to Count 8 is denied.

For the reasons above, Defendants' motion for partial judgment on the pleadings pursuant to Rule 12(c) is GRANTED in part and DENIED in part. Counts One through Four are time barred and therefore DISMISSED in their entirety. Count Six is DISMISSED only as to CMHA. Counts Seven and Eight are DISMISSED only as to Lt. Drew in his individual and official capacities. Defendants' motion is DENIED as to Counts Five and Eight.

II. Motion for Summary Judgment

The remaining claims are tortious interference (Lt. Drew only), civil liability (Lt. Drew only), Title VII discrimination (CMHA only), and Title VII retaliation (CMHA only).

Before addressing Defendants' motion as to these remaining claims, the Court must resolve Plaintiff's objection to the declarations Defendants submitted in support. Plaintiff argues the declarations do not comply with 28 U.S.C. § 1746 and cannot be evidence as part of the Court's Rule 56 analysis. (See Doc. 58 at 2535-36; Docs. 40-1-4.) The declarations are signed, and the statements therein declared under penalty of perjury. (See Docs. 40-1-4.) The deficiency, as Plaintiff argues, is they do not expressly state the contents are true and accurate. (Doc. 58 at 2535.) In response, Defendants maintain the original declarations are substantially in the form set forth in 28 U.S.C. § 1746. (Doc. 60 at 2718 n.3.) Notwithstanding, Defendants submitted revised declarations with their reply brief. (See id.; Docs. 60-1-4.) These revised declarations are identical to the previously submitted versions, save they now declare all contents to be true and accurate. (Id.)

Districts courts have discretion to accept amended declarations. See Collazos-Cruz v. United States, 117 F.3d 1420, 1997 WL 377037, at *3 (6th Cir. July 3, 1997) (reversing district court's exclusion of corrected declaration that complied with § 1746); Jones v. Pharmerica Corp., No. 3:21-CV-00134, 2023 WL 3681711, at *2-3 (M.D. Tenn. Jan. 4, 2023) (permitting revised declaration where it was submitted timely and did not differ in substance from

the earlier filed declaration); see also Ross v. City of Dublin, Ohio, No. 2:14-CV-02724, 2016 WL 7117389, at *8 (S.D. Ohio Dec. 7, 2016) (recognizing court's discretion to accept amended declarations and accepting amended declaration). A case cited by Plaintiff, In re FirstEnergy Corp. Sec. Litig., No. 2:20-CV-03785-ALM-KAJ, 2024 WL 1984802, at *6-7 (S.D. Ohio May 6, 2024), motion to certify appeal denied, No. 2:20-CV-03785-ALM-KAJ, 2024 WL 3384864 (S.D. Ohio July 12, 2024), did not permit an amended declaration because the request to amend came after the Court ruled on the pending motion. That is not the case here.

Exercising its discretionary authority to do so, the Court accepts the amended declarations for the following reasons: Defendants timely acted to cure the identified deficiency by submitting revised versions with their reply brief; there is no substantive difference between the first-filed declarations and the amended ones; they contain the requisite statement that the contents are true and accurate; and they were submitted before the Court's ruling on summary judgment.

A. Undisputed Facts

On February 26, 2016, Plaintiff was first hired as police officer with CMHA PD. (Doc. 34-1 at 565-67.) In 2017, Plaintiff resigned from the department to work for the Sandusky Police Department ("Sandusky"). (Id. at 583-84.) Plaintiff was only employed with Sandusky for thirty days. (Id. at 584-87.) Effective August 14, 2017, Plaintiff was rehired at CMHA PD. (Id. at 587-88.) Upon

Plaintiff's return, Lt. Drew asked Plaintiff if he wanted to join the SWAT Team. (Doc. 60-1 ¶ 4.)

Shelton was required to know and adhere to CMHA's policies and procedures, all of which were detailed in CMHA PD's Rules and Regulations. (Doc. 34-1 at 575.) These Rules and Regulations applied when Plaintiff was on duty and when he was off duty. (Id. at 603.)

During his off-duty time, Plaintiff created music and videos. (Doc. 58 at 2519.) Plaintiff also maintained publicly accessible social media accounts. (Doc. 34-1 at 527.) Since March 2020, Plaintiff's social media activity identified him as a CMHA PD officer. (Id. at 528-29, 534 36, 542; Doc. 34-2; Doc. 34-3, Doc. 34-4.) Specifically, on March 20, 2020, Plaintiff posted a photo of himself to his Instagram account while on duty. (Doc. 34-1 at 528-29; Doc. 34-2; Doc. 34-3.) In this photo, Shelton is standing in front of a marked CMHA PD cruiser wearing his CMHA PD uniform. (Doc. 34-2.) Plaintiff's Facebook page was linked to his Instagram and YouTube accounts. (Doc. 34-1 at 534-36, 549-51; Doc. 34-5.) Plaintiff's Instagram photos automatically posted to his Facebook page. (Doc. 34-1 at 550-51.) He had 12,000 Instagram followers and 14,000 Facebook followers. (Id. at 541-46, 549.) When deposed, Plaintiff could not say whether or not his social media followers included any present or former CMHA residents. (Doc. 34-1 at 536, 545-46.)

Plaintiff posted videos to his public YouTube channel. (Doc. 34-1 at 537-38.) These videos linked to the other social media accounts wherein Shelton identified himself as a CMHA PD officer. (Id. at

773-75.) Five of Plaintiff's music videos were stated grounds for disciplinary action. (Doc. 60-4 at 2798-2800.) Their content is undisputed.

The video most often mentioned in this litigation is the "Head Shot" video. In it, Plaintiff indiscriminately executes a Caucasian homeless man. (Doc. 13 ¶ 42; Doc. 35.) "Head Shot" was filmed on a public street. (Doc. 34-1 at 768, 770-71.) Plaintiff provided the homeless man with the open container of liquor shown in the video. (Id. at 789.) Plaintiff acknowledges he was a CMHA PD officer at the time he filmed this video. (Id. at 770.)

In the video for "WAP Remix – Dry Ass Nookie," Plaintiff brandishes a knife while telling a woman he will "slay" her. (Doc. 34-1 at 96-99; Doc. 35.) The "Great Man Challenge" video shows Plaintiff in his car holding a gun and a bottle of liquor. (Doc. 34-1 at 803-05; Doc. 34-28; Doc. 35.) The videos for "Bust Down Thotiana" and "Talk My Shit Challenge" contain violent or derogatory comments about women. (Doc. 34-28; Doc. 35.)

In early September 2020, Sgt. Smiddy reported the "Head Shot" video to Lt. Drew and Cmdr. Burdyshaw. (Doc. 37-1 at 1207-08; Doc. 60-1 ¶13; Doc. 60-2 ¶ 10.) Lt. Drew and Cmdr. Burdyshaw then reported the "Head Shot" video to Deputy Chief Victor McDowell. (Doc. 37-1 at 1209; Doc. 60-1 ¶ 14.)

A few days later, on Friday, September 18, 2020, Chief Gonzalez held a regularly scheduled briefing session with Lt. Drew and Cmdr. Burdyshaw. (Doc. 40 at 1381; Doc. 36-1, at 1132; Doc. 60-1 ¶ 15; Doc. 60-3 ¶ 9.) During that meeting, Lt. Drew and Cmdr. Burdyshaw asked Chief

Gonzalez if he had been briefed on Plaintiff's videos. (Doc. 34-1 at 677; Doc. 36-1 at 1129-33; Doc. 37-1 at 1209; Doc. 60-1 ¶ 15; Doc. 60-3 ¶ 9.) Chief Gonzalez said he had not, so they informed him of the "Head Shot" video and told him how to access it. (Id.) Chief Gonzalez reviewed the "Head Shot" video on YouTube. (Doc. 36-1 at 1131; Doc. 60-3 ¶¶ 9-10; Doc. 60-1 ¶ 15.) Lt. Drew advised the videos were circulating throughout the department, and employees were waiting to see what, if anything, CMHA PD management was going to do about them. (Doc. 40 at 1381; Doc. 36-1, at 1132-33; Doc. 60-3 ¶ 11.)

After viewing the "Head Shot" video and other of Plaintiff's publicly posted videos, Chief Gonzalez was "very concerned and alarmed." (Doc. 60-3 ¶ 11.) That same day, September 18, 2020, Chief Gonzalez immediately escalated the matter to Chief Executive Officer Jeffery K. Patterson ("Patterson"). (Doc. 36-1 at 1133; Doc. 60-3 ¶ 11.) Chief Gonzalez informed Patterson he "had just watched some disturbing videos on YouTube that featured one of my detectives," and told Patterson he needed to do something about it. (Doc. 36-1 at 1133-34; Doc. 60-3 ¶ 11.) Chief Gonzalez and Patterson did not discuss what actions should be taken, but Patterson said he would review the matter and get back to Chief Gonzalez. (Doc. 36-1 at 1134; Doc. 60-3 ¶ 11.) On either the following Monday or Tuesday, Patterson told Chief Gonzalez HR would review the videos and initiate an investigation. (Doc. 36-1 at 1135; Doc. 60-3 ¶ 12.)

Around 3:30 p.m. on September 18, 2020, the same day Chief Gonzalez reported the videos to Patterson, Plaintiff submitted a complaint he captioned "Harassment in the Workplace" (hereafter "complaint") to HR Director Betsy McCafferty ("McCafferty"). (Doc. 34-1 at 665-67, 672-73; Doc. 34-19; Doc. 38-1 at 1283; Doc. 60-4 ¶ 5.) That day, McCafferty discussed the complaint then HR Deputy Director Ronaye Steele ("Steele"). (Doc. 38-1 at 1283-88, 1290.) Other than CMHA's in-house counsel and Steele, McCafferty did not discuss Plaintiff's allegations with anyone else. (Doc. 38-1 at 1287, 1289-90.)

CMHA retained outside counsel to investigate Plaintiff's complaint. (Doc. 34-1 at 678 79; Doc. 38-1 at 1292-93; Doc. 60-4 ¶ 7.) The investigators went through each of Plaintiff's allegations. (Doc. 34-1 at 683.) Outside counsel shared the results of its investigation with CMHA. (Doc. 38-1 at 1297.) CMHA communicated the findings to Plaintiff in late December 2020. (Doc. 60-3 ¶ 14.) Of the 24 allegations, 23 of them were unsubstantiated. (Doc. 34-19; Doc. 60-3 ¶ 15, Exhibit A.) The sole finding related to a comment that Plaintiff alleged Cmdr. Burdyshaw made, that being, "OMG he is Black." [8] (Doc. 38-1 at 1299-1302; Doc. 34-1 at 683 85; Doc. 60-3 at 2752-53, 2764.) While Cmdr. Burdyshaw could not recall making the isolated comment, HR addressed the impropriety of such statements with him. (Doc. 38-1 at 1299-1302.)

[8] Cdr. Burdyshaw is not a party to this action.

Neither Lt. Drew nor Chief Gonzalez were notified of the complaint until several weeks, if not months, after it was filed. Lt. Drew learned of the complaint in connection with his November 2020 interview with outside counsel. (Doc. 60-1 ¶ 12; Doc. 37-1 at 1203.) Chief Gonzalez learned of the complaint when outside counsel disclosed the results of their investigation in December 2020. (Doc. 60-3 ¶ 14.) Plaintiff concedes he did not present his complaint to Chief Gonzalez. (Doc. 34-1 at 674-75.) Plaintiff does not present evidence that Lt. Drew was aware of Plaintiff's complaint on September 18, 2020. (Id. at 859-62.)

In the months between Plaintiff submitting his complaint and December 2020, Chief Gonzalez placed Plaintiff on paid administrative leave pending the department's investigation of alleged misconduct depicted in and related to the videos. (Doc. 34-1 at 748-50; Doc. 34-25; Doc. 34-26; Doc. 60-3 ¶ 13.)

On January 6, 2021, CMHA conducted an information gathering meeting with Plaintiff over Zoom, his union representative Chuck Wilson, Chief Gonzalez, McCafferty, and Steele. (Doc. 34-1 at 754-55 ; Doc. 36-1 at 1139; Doc. 60-3 ¶17; Doc. 60-4 ¶ 10.) Plaintiff was advised there were five music videos that concerned CMHA and CMHA PD. (Doc. 34-1 at 755; Doc. 60-3 ¶ 17.) Plaintiff answered questions about the videos. (Id.)

On January 12, 2021, Chief Gonzalez sent a memorandum to McCafferty sharing his observations about the videos and expressing his concerns about Plaintiff's ability to perform his duties as a police officer. (Doc. 34-1 at 756-57; Doc. 34-27; Doc. 60-3 ¶

18, Exhibit C.) Chief Gonzalez outlined the applicable rules and policies Plaintiff violated and expressed concerns that the videos—though created while Plaintiff was off-duty—could negatively affect the reputation of CMHA and CMHA PD. (Doc. 34-1 at 756-57; Doc. 34-27; Doc. 36-1 at 1145; Doc. 36-2; Doc. 38-1 at 1316-17; Doc. 38-7; Doc. 60-3 ¶ 18, Exhibit C; Doc. 60-4 ¶ 10.) Chief Gonzalez requested a pre-disciplinary conference. (Id.)

On January 27, 2021, a pre-disciplinary conference was held. (Doc. 34-1 at 819.) Plaintiff participated. (Id.) At its conclusion, McCafferty and Steele agreed, based on the nature of the videos, Plaintiff's statements about them, Chief Gonzalez's memo, and the applicable rules and policies, Plaintiff should be terminated from CMHA PD. (Doc. 60-3 ¶ 20; Doc. 60-4 ¶ 12.)

On January 29, 2021, Plaintiff was terminated. (Doc. 34-1 at 819-20; Doc. 34-34; Doc. 60-4 ¶¶ 12-13.) The notice of termination stated Plaintiff's discharge resulted from the videos depicting violent and illegal conduct, promoting violence generally, making derogatory and offensive statements about women, and promoting violence against women, all of which violated several enumerated CMHA and CMHA PD policies, rules, and regulations. (Doc. 34-34; Doc. 34-1 at 821-22; Doc. 60-4 at 2798-2800.)

On January 29, 2021, Plaintiff grieved his discharge. (Doc. 34-1 at 824-26; Doc. 34-35.) On February 17, 2021, Plaintiff filed an EEOC charge of discrimination. (Doc. 13-1 at 190.) The arbitrator ruled that Plaintiff must be permitted to return to

work with CMHA PD effective November 28, 2022. (Doc. 34-1 at 835; Doc. 34-37.)

Prior to his reinstatement with CMHA PD, Plaintiff applied for law enforcement positions, first with Timberlake (September 2021) and Bedford Heights (August 2022). (Doc. 13 ¶¶ 78-80.) As part of the application process, Plaintiff signed releases authorizing both police departments to contact his former employers. (Doc. 34-1 at 894-904; Doc. 34-43; Doc. 34-44; Doc. 34-45.) It is undisputed Lt. Drew was neither contacted by nor did he make any statements to those departments about Plaintiff. (Doc. 34-1 at 900-06; Doc. 60-1 ¶ 16.)

B. Law and Analysis

1. Standard of Review

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Fed. R. Civ. P. 56(a). "Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and affidavits show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The moving party bears the burden of showing that no genuine issues of material fact exist." Williams v. Maurer, 9 F.4th 416, 430 (6th Cir. 2021) (citations and quotations omitted). A "material" fact is one that "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "[A] genuine dispute of material fact exists if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Abu-Joudeh v. Schneider, 954

F.3d 842, 849–50 (6th Cir. 2020) (citations and quotations omitted).

"Once the moving party satisfies its burden, the burden shifts to the nonmoving party to set forth specific facts showing a triable issue of material fact." Queen v. City of Bowling Green, Ky., 956 F.3d 893, 898 (6th Cir. 2020) (quotation and citations omitted). On summary judgment, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Kalamazoo Acquisitions, L.L.C. v. Westfield Ins. Co., 395 F.3d 338, 342 (6th Cir. 2005). A party asserting or disputing a fact must cite evidence in the record or show the record establishes either the absence or the presence of a genuine dispute. See Fed. R. Civ. P. 56(c) & (e). Rule 56 further provides "[t]he court need consider only" the materials cited in the parties' briefs. Fed. R. Civ. P. 56(c)(2); see also Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479–80 (6th Cir. 1989) ("The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.").

"Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (quotation and citation omitted). The Court's role is not to make credibility determinations or "weigh" conflicting evidence. Payne v. Novartis Pharms. Corp., 767 F.3d 526, 530 (6th Cir. 2014). "The ultimate question is whether the evidence presents a sufficient factual disagreement to require

submission of the case to the jury, or whether the evidence is so one-sided that the moving parties should prevail as a matter of law." Id.

2. Tortious Interference with Employment Relations – Lt. Drew

As discussed above, to establish a claim for tortious interference with employment relations, a plaintiff must allege: "(1) the existence of an employment relationship between plaintiff and the employer; (2) the defendant was aware of this relationship; (3) the defendant intentionally interfered with this relationship; and (4) the plaintiff was injured as a proximate result of the defendant's acts." Gerace, 184 N.E.3d at 923. Lt. Drew argues Plaintiff cannot establish any of these elements and even if he could, any reference to a prospective employer by Lt. Drew was privileged under Ohio Rev. Code § 4113.71(B). (Doc. 40 at 1391.)

Because Plaintiff stated no opposition to this claim in response to Defendants' motion for summary judgment (see Doc. 58), Lt. Drew asserts "Plaintiff properly abandoned" this claim. (Doc. 60 at 2717). The Sixth Circuit's "jurisprudence on abandonment of claims is clear: a plaintiff is deemed to have abandoned a claim when a plaintiff fails to address it in response to a motion for summary judgment." Brown v. VHS of Mich., Inc., 545 F. App'x 368, 372 (6th Cir. 2013) (collecting cases). But even if Plaintiff responded, the tortious interference claim still fails

as a matter of law.[9]

As Lt. Drew points out, there is no evidence Lt. Drew made any statements at all about Shelton to either Timberlake or Bedford Heights. (Doc. 34-1 at 900-06; Doc. 60-1 ¶ 16.) And Plaintiff has presented none. (See Doc. 34-1 at 900-06.) Plaintiff therefore cannot establish any interference, let alone intentional interference with Plaintiff's prospective employment relations.[10] Lt. Drew's motion for summary judgment on Count Five is granted.

3. Civil Liability – Lt. Drew

Also discussed above, Ohio Rev. Code § 2307.60 "independently authorizes a civil action for damages caused by criminal acts." Buddenberg v. Weisdack, 2020-Ohio-3832, ¶ 6, 161 Ohio St. 3d 160, 161, 161 N.E.3d 603, 605 (citation omitted). As presented here, Plaintiff's civil liability claim is premised on a violation of Ohio Rev. Code § 2921.45. Section 2921.45 attaches criminal liability for interference with, conspiracies to interfere with, and

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[9] This approach aligns with the Sixth Circuit's instructions to district courts analyzing unopposed motions for summary judgment. *E.g., Carver v. Bunch*, 946 F.2d 451, 455 (6th Cir. 1991) ("[A] district court cannot grant summary judgment in favor of a movant simply because the adverse party has not responded. The court is required, at a minimum, to examine the movant's motion for summary judgment to ensure that he has discharged that burden.")

[10] Since Plaintiff's claim fails on the merits, Lt. Drew's assertion of privilege does not need to be addressed.

attempts to interfere with another's constitutionally and statutorily protected rights.[11]

Lt. Drew argues the facts do not support a finding he knowingly caused or attempted to cause a deprivation of any constitutionally protected right and, even if he did, he is immune from claims asserted against him in his individual capacity. (Doc. 40 at 1394 (citing Ohio Rev. Code § 2744.03(A)(6)).)[12]

In opposition, Plaintiff defines this claim as being predicated on Plaintiff's "constitutional right to free speech under the First Amendment."[13] Framed as evidentiary support for retaliation for filing the complaint, Plaintiff's opposition brief puts forth scant evidence of Lt. Drew's actions concerning the videos. Lt. Drew and Cmdr. Burdyshaw reported the "Head Shot" video and other videos to Deputy Chief

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[11] The Ohio Supreme Court in Buddenberg settled a dispute among various state and federal courts, that being whether a criminal conviction is required to proceed on a claim for civil liability under § 2307.60. 161 N.E.3d at 606. It is not. *Id*. A conviction can be some evidence, but the absence of a criminal conviction does not preclude a claim for civil liability under Ohio law. *Id*. at 607.

[12] In opposition, Plaintiff says nothing of Lt. Drew's assertion of immunity. Because the claim fails on the merits, Lt. Drew's assertion of immunity does not need to be addressed.

[13] Plaintiff's factual summary includes Plaintiff's attempt to wear a "Black Lives Matter" mask while in uniform. But Plaintiff neither argues nor presents evidence that Lt. Drew prevented him from wearing the mask. (*See* Doc. 58-1 at 2544-45.)

McDowell before Plaintiff submitted his complaint. (Doc. 58 at 2521.) On September 18, 2020, they made a similar report to Chief Gonzalez. (Id.) Chief Gonzalez immediately reported the video to Patterson and, in doing so, told Patterson CMHA PD needed to address the videos. (Id.)

Lt. Drew directs the Court to additional undisputed facts: Sgt. Smiddy reported the video to him in early September 2020. (Doc. 40 at 1381; Doc. 60-1 ¶¶ 13-14; Doc. 60-2 ¶¶ 9-10.) The September 18, 2020 meeting with Chief Gonzalez was a regularly scheduled briefing, it was not held to address Plaintiff specifically. (Doc. 40 at 1381; Doc. 36-1, at 1132; Doc. 60-1 ¶ 15; Doc. 60-3 ¶ 9.) During that meeting, Lt. Drew told Chief Gonzalez the videos were circulating throughout the department, and employees were waiting to see what, if anything, CMHA PD management was going to do about them. (Doc. 40 at 1381; Doc. 36-1, at 1132-33; Doc. 60-3 ¶ 11.)

Lt. Drew did not place Plaintiff on paid leave. He did not terminate Plaintiff's employment. Instead, Chief Gonzalez placed Plaintiff on paid leave (Doc. 60-3 ¶ 13), and McCafferty made the decision to discharge Plaintiff (Doc. 60-3 ¶ 20). Lt. Drew was not aware of Plaintiff's complaint until November 2020. (Doc. 60-1 ¶ 12.) Plaintiff has presented no evidence to contradict these points.

Notwithstanding this presentation of facts in his opposition brief and the additional facts presented by Lt. Drew, Plaintiff submitted the affidavit of a former partner, who attested to telling Shelton "as soon as his harassment complaint was submitted,

Drew would be coming after him. I told Shelton that 'Drew is going to come for [you].'" (Doc. 58-3 ¶ 5.) The Court makes no credibility findings, but it does consider such submission in light of the undisputed timeline of events.

Lt. Drew raised concerns about the videos with his chain of command before Shelton submitted his complaint. (Doc. 60-1 ¶¶ 13-15.) This is undisputed. Lt. Drew was unaware of the complaint until November 2020, almost two months after it was submitted to HR. (Doc. 60 1 ¶ 12.) Construing all factual inferences in Plaintiff's favor, no jury could conclude Lt. Drew's statements to his superiors were in retaliation for complaints Plaintiff had not yet made. And Plaintiff submits no evidence that Lt. Drew engaged in any post-complaint conduct from which a jury could infer he interfered with, attempted to interfere with, or conspired with others to interfere with Plaintiff's First Amendment rights.[14]

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[14] Because the factual record eliminates the possibility that Lt. Drew's statements about the videos were in retaliation for a complaint yet to be filed, the Court is not addressing Plaintiff's failure to address that, as a public employee posting music videos to social media accounts identifying him as such, he may not have the protected rights he asserts. *See Handy-Clay v. City of Memphis*, 695 F.3d 531 (6th Cir. 2012) (while "public employees do not forfeit all their First Amendment rights simply because they are employed by the state or a municipality," they necessarily "accept certain limitations on [their] freedom") (citing *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006)). The Sixth Circuit has "long recognized 'the importance of deference' to law enforcement officials when speech threatens to undermine the functions of organizations charged with maintaining public safety." *Gillis v. Miller*, 845 F.3d 677, 684 (6th Cir. 2017); *see*

Plaintiff failed to present facts to support a finding that Lt. Drew knowingly deprived Plaintiff of any constitutionally or statutorily protected right.[15] Lt. Drew's motion for summary judgment on Count Six is granted.

4. Title VII Claims – CMHA

Title VII discrimination and retaliation claims based on circumstantial evidence, like the evidence presented here, are evaluated under the McDonnell Douglas burden-shifting framework. 411 U.S. 792, 802-03 (1973); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); Chen v. Dow Chem. Co., 580 F.3d 394, 400-02 (6th Cir. 2009).

Under this tripartite test, the plaintiff must first establish a prima facie case of discrimination by a preponderance of the evidence. McDonnel Douglas Corp., 411 U.S. at 802 03; Burdine, 450 U.S. at

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also Kirkland v. City of Maryville, Tenn., 54 F.4th 901, 909 (6th Cir. 2022) (the "heightened need for order, loyalty, and efficiency in law enforcement agencies" justified defendant's concern that plaintiff's Facebook post threatened to undermine the police department and supported plaintiff's termination).

[15] *See Buddenberg v. Est. of Weisdack*, No. 1:18-CV-00522, 2024 WL 159001, at *57 (N.D. Ohio Jan. 16, 2024) ("Because the Court has determined that Plaintiff's federal and State law claims fail as matters of law, there is no underlying deprivation of a constitutional or statutory right to satisfy this statute and provide Plaintiff with a remedy. Therefore, Plaintiff's claim for interference with civil rights fails"); *Cromer v. City of Cleveland*, No. 20-CV-2080, 2021 WL 293046, at *4 (N.D. Ohio Jan. 28, 2021) ("[Plaintiff's] Ohio Rev. Code § 2307.60 claim is dismissed with prejudice because the Court finds that there is no federal constitutional violation in this case").

252-53. This burden "is not onerous." Burdine, 450 U.S. at 253. If established, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. Id. Should the defendant carry the burden, the plaintiff must prove the stated justification is pretext for discrimination. Id. Throughout this entire process, the burden of persuasion remains on the plaintiff to demonstrate intentional discrimination. Id.

a. Discrimination

To establish a prima facie case for Title VII race discrimination, a plaintiff must establish that he: (1) is a member of a protected class; (2) suffered an adverse employment action; (3) was qualified for his position; and (4) was either replaced by someone outside the protected class or was treated differently than similarly-situated, non-protected employees. Peeples v. City of Detroit, 891 F.3d 622, 634 (6th Cir. 2018).

There is no dispute as to the first three elements. And Plaintiff does not contend he was replaced by someone outside of his protected class. CMHA's challenge is to whether there is any evidence Plaintiff "was treated less favorably than similarly situated, nonprotected employees." (Doc. 40 at 1395.) To be "similarly situated" the other employee must be similar to Plaintiff in "all relevant respects." Clayton v. Meijer, Inc., 281 F.3d 605, 611 (6th Cir. 2002) (quoting Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 353 (6th Cir.1998)) (emphasis in original). Although not an exclusive list of factors to consider, the other employee "must have dealt with

the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992) (citation omitted).

Plaintiff's opposition brief makes no mention of such a similarly situated employee. In earlier portions of his opposition brief, Shelton mentions Caucasian officers who were not told to remove "Blue Lives Matter" masks. (Doc. 58 at 2520.) He also mentions being threatened with AWOL for missing SWAT training when Caucasian officers were not told the same.[16] (See Doc. 34-1 at 739-47, 851-52, 879-83; Doc. 60-3 at 2745, 2780.) But Plaintiff has not shown—as he must—these other employees shared a supervisor with him or the absence of mitigating or differentiating circumstances. Thus, Plaintiff has not demonstrated his prima facie case.

Instead of addressing the prima facie case in his opposition brief, Shelton jumps ahead in the McDonnell Douglas analysis and asserts (without any citations to case law or the record) that CMHA's

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[16] Plaintiff compares himself to Officer Sanders, who he alleged overslept and missed multiple SWAT trainings but was not disciplined. (Doc. 58-1 at 2541-42; Doc. 34-1 at 746-47.) However, Plaintiff was disciplined for disobeying the directive to report to training late after he called in that the overslept—he was not disciplined for oversleeping. (Doc. 34-1 at 739-46.) Plaintiff further concedes he does not know whether Officer Sanders ever disobeyed an order for which he was not disciplined. (*Id*. at 747.)

reasons for terminating him were pretextual. (See Doc. 58 at 2536-2537.) Plaintiff's arguments about pretext cannot be considered by the Court if he has not first established a prima facie case of discrimination.[17] This he has not done. CMHA's motion for summary judgment on Count Seven is granted.

b. Retaliation

To establish a prima facie case for a Title VII retaliation claim, the employee must produce evidence showing that (1) he engaged in protected activity, (2) the employer was aware of the protected activity, (3) the employer took an action that was materially adverse to the employee, and (4) there is a causal connection between the plaintiff's protected activity and the employer's adverse action. Jackson v. Genesee Cnty. Rd. Comm'n, 999 F.3d 333, 343-44 (6th Cir. 2021).

It is undisputed Plaintiff engaged in protected activity by submitting his complaint to HR and his termination was an adverse action. However, CMHA asserts "Plaintiff cannot establish the second element" of his prima facie case because he "has no evidence to suggest that Smiddy, Drew, or Gonzalez knew that Plaintiff was going to or had submitted a complaint to HR" at the time they reported Plaintiff's music videos. (Doc. 40 at 1397; see also Doc. 34-1 at

[17] Even if Plaintiff could establish a prima facie discrimination case, as discussed below, CMHA articulated a legitimate, non-discriminatory reason for termination, and Plaintiff has not demonstrated CMHA's stated reason was pretextual.

859-63, 907 08; Doc. 60-1 ¶ 12; Doc. 60-2 ¶ 12; Doc. 60-3 ¶ 14; Doc. 60-4 ¶¶ 4-7.) Plaintiff responds, with no citation to the record, "Defendants were aware that Plaintiff was asserting his First Amendment rights: the Plaintiff hand-delivered his workplace harassment complaint to Defendants." (Doc. 58 at 2537.) To be clear, the complaint was submitted on September 18, 2020. The videos were being discussed among members of Shelton's chain of command before and on that day. Notwithstanding, HR received Shelton's complaint on September 18, 2020, at or around 3:30 p.m. (Doc. 60-4 ¶ 5.) And HR participated in the decision to discharge Shelton. (Id. ¶¶ 10-12.) This evidence is sufficient to show CMHA knew of his protected activity. (See id. ¶¶ 4-12, 2798-2800; see also Proffitt v. Metro. Gov't of Nashville & Davidson Cnty., Tenn., 150 F. App'x 439, 442-43 (6th Cir. 2005) (knowledge of an employee's protected activity can be shown by circumstantial evidence).)

CMHA also argues Plaintiff cannot prove the fourth element of the prima facie case: causation. (Doc. 40 at 1398.) "To prove causation in a Title VII retaliation case, a plaintiff must show that the employee's protected activity was a 'but for' cause of the employer's adverse action against [him], meaning the adverse action would not have occurred absent the employer's desire to retaliate." George v. Youngstown State Univ., 966 F.3d 446, 459 (6th Cir. 2020) (citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352, 360 (2013)).

To support "but for" causation, Plaintiff argues "immediately after Plaintiff filed his workplace

harassment complaint, Defendants used Plaintiff's music and music videos as a pretext to terminate his employment." (Doc. 58 at 2537.) The complaint was submitted to HR on September 18, 2020. Plaintiff was terminated on January 29, 2021.[18] There is a difference of months, not days or weeks. See George, 966 F.3d at 459.

The undisputed timeline of events precludes even an inference that "but for" the complaint, Plaintiff would not have been terminated. In early September 2020, Sgt. Smiddy reported the "Head Shot" video to Lt. Drew. (Doc. 40 at 1381; Doc. 60-1 ¶¶ 13-14; Doc. 60-2 ¶¶ 9-10.) It was then reported to Deputy Chief McDowell. (Doc. 58 at 2521.) On September 18, 2020, Lt. Drew and Cmdr. Burdyshaw told Chief Gonzalez about Plaintiff's videos. (Doc. 40 at 1381; Doc. 36-1, at 1132-33; Doc. 60-1 ¶ 15; Doc. 60-3 ¶¶ 9, 11.) Chief Gonzalez then immediately escalated the matter to Patterson and told him he needed to do something about it. (Id.) Later that day, around 3:30pm, Plaintiff delivered his complaint to HR. (Doc. 34-1 at 665 67, 672-73; Doc. 34-19; Doc. 38-1 at 1283; Doc. 60-4 ¶ 5.) What Plaintiff does not address is that his videos were being reported up the chain of command before his complaint was ever filed. And while some reporting, namely the reporting to Patterson, occurred on the same day, Chief Gonzalez did not know of the complaint when he told Patterson that CMHA PD needed to address

[18] While Shelton was placed on paid administrative leave on October 6, 2020, he does not identify this as an adverse action. (*See* Doc. 58 at 2537.)

the videos. (Doc. 60-3 ¶¶ 13, 17-20; Doc. 60-4 ¶¶ 8, 10-13.) Plaintiff therefore cannot establish causation.

Even assuming Plaintiff established his prima facie case of retaliation (which he did not), CMHA articulated a legitimate, non-discriminatory reason for termination. The Sixth Circuit has "held on many occasions that the violation of a wide variety of an employer's articulated policies constitutes a legitimate, nondiscriminatory reason for adverse employment actions. Santiago v. Meyer Tool Inc., No. 22-3800, 2023 WL 3886405, at *4 (6th Cir. June 8, 2023) (citations omitted). Here, CMHA determined five of Plaintiff's publicly posted rap music videos violated CMHA and CMHA PD policies, rules, and regulations. This was all laid out in Plaintiff's January 29, 2021 termination letter. (Doc. 60-4 at 2798-2800.)

Plaintiff also cannot prove pretext. "Plaintiffs typically show pretext in one of three ways: '(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the employer's action, or (3) that the proffered reasons were insufficient to motivate the employer's action.'" Miles v. S. Cent. Hum. Res. Agency, Inc., 946 F.3d 883, 888 (6th Cir. 2020) (quoting Chen, 580 F.3d at 400). The ultimate inquiry is whether the employer fired the employee for the stated reason or whether the employer made up its stated reason to conceal retaliation. Tingle v. Arbors at Hilliard, 692 F.3d 523, 530 (6th Cir. 2012) (citations omitted). Put another way, was the stated reason provided in order to hide the true motivation—retaliation? Id. A

plaintiff is therefore "required to offer evidence from which a jury could reasonably reject the defendants' stated reason for disciplining—and ultimately firing—[him], and that it used those reasons to mask its retaliation against [him for his protected activity]." Id.

Plaintiff does not dispute his videos (1) show him indiscriminately executing a homeless man and promoting violence against women, or (2) violated CMHA policies, rules, and regulations. (See Doc. 60-4 at 2798-2800.) And as discussed above, the timeline of events establishes CMHA began taking measures to address the videos before Plaintiff filed his complaint. Plaintiff therefore has not provided evidence sufficient to support that a jury could find CMHA's stated reason for firing him masked retaliation.

For these reasons, Shelton has not established a prima facie case of retaliation. And, even if he did, CMHA provided a legitimate, non-discriminatory reason, and Shelton cannot establish the reason was pretextual. The Title VII retaliation claim fails as a matter of law, and CMHA's motion for summary judgment on Count Eight is granted.

III. Conclusion

For the reasons stated herein, Defendants' motion for partial judgment on the pleadings is GRANTED in part and DENIED in part. Defendants' motion for summary judgment is GRANTED on the remaining claims.19 This case is dismissed.

IT IS SO ORDERED

Date: September 27, 2024

s/Bridget M Brennan
BRIDGET MEEHAN BRENNAN
UNITED STATES DISTRICT JUDGE