

UNREPORTED CASES



Caution

As of: October 14, 2014 1:45 PM EDT

Barner v. City of Harvey

United States District Court for the Northern District of Illinois, Eastern Division

September 16, 1998, Decided ; September 18, 1998, Docketed

No. 95 C 3316

Reporter

1998 U.S. Dist. LEXIS 14937; 1998 WL 664951

EZELLA BARNER, MYRTHA BARNER, JOYCE V. BROWN, RONALD BURGE, BARBARA L. CHALMERS, CHARLES L. CLARK, RODERICK HAYNES, RUFUS FISHER, HENRY JEFFERSON, MITCHELL VERSHER, DENARD EAVES, LEE GRAY, on behalf of themselves and all others similarly situated, Plaintiffs, v. CITY OF HARVEY, NICHOLAS GRAVES, CHRISTOPHER BARTON, PHILLIP HARDIMAN, CAMILLE DAMIANI, FRANK PIEKARSKY, DONALD WHITTED, and MARY ANN SAMPSON, individually and in their official capacities, Defendants.

Disposition: [*1] Defendants' motion for summary judgment GRANTED IN PART and DENIED IN PART.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1 Depositions are admissible in summary judgment proceedings to establish the truth of what is deposed provided, of course, that the deponent's testimony would be admissible if he were testifying live. In the absence of a showing that a witness could not testify at trial to what he stated when he was deposed, the court will allow the deposition in as evidence for summary judgment.

Evidence > ... > Statements as Evidence > Hearsay > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

Evidence > ... > Hearsay > Rule Components > General Overview

Evidence > ... > Hearsay > Rule Components > Declarants

Evidence > ... > Hearsay > Rule Components > Statements

HN2 *Fed. R. Evid. 801(c)* defines "hearsay" as a statement, other than one made by the declarant while

testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Evidence > Admissibility > Expert Witnesses

HN3 The general rule regarding admissibility of affidavits at summary judgment is that the affiant, like any witness in a case other than an expert witness, must only testify to matters outside his personal knowledge. Additionally, where a witness's affidavit contradicts the witness's sworn deposition, the affidavit will be disregarded.

Civil Procedure > Discovery & Disclosure > Disclosure > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Misconduct During Discovery

HN4 Under *Fed R. Civ. P. 37(a)*, a party that without substantial justification fails to disclose information required by *Fed R. Civ. P. 26(a)* or *26(e)(1)* shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. *Fed R. Civ. P. 37(a)*'s sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of *Fed R. Civ. P. 26(a)* was either justified or harmless.

Civil Procedure > Discovery & Disclosure > Discovery > Misconduct During Discovery

HN5 While *Fed R. Civ. P. 37(c)(1)* states that additional sanctions may be imposed on motion and after affording an opportunity to be heard, *Fed R. Civ. P. 37(c)(1)* makes exclusion of evidence a more automatic sanction and does not require the court to afford the nondisclosing party an opportunity to be heard.

Civil Procedure > Discovery & Disclosure > Disclosure > General Overview

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN6 Fed. R. Civ. P. 26(a)(2)(A) requires parties to disclose to other parties the identity of any person who may be used at trial to present evidence under Fed. R. Evid. 702, 703, or 705.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN7 U.S. Dist. Ct., N.D. Ill., R. 12(M) requires a party submitting a motion for summary judgment to submit a statement of material facts as to which the moving party contends there is no genuine issue and that entitle the moving party to a judgment as a matter of law. U.S. Dist. Ct., N.D. Ill., R. 12(N) states that all material facts set forth in the U.S. Dist. Ct., N.D. Ill., R. 12(M) statement will be deemed to be admitted unless controverted in the U.S. Dist. Ct., N.D. Ill., R. 12(N) statement. Moreover, the party defending against summary judgment must point to specific portions of the record in support of its interpretation of the case, or the facts will be deemed admitted.

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN8 In a case where a plaintiff asserts his own rights in an attempt to establish a First Amendment claim in an employment context, he must present evidence that his speech (or conduct) was constitutionally protected and that it was a substantial factor in his demotion. In a case where a plaintiff claims he was fired because of his political affiliation with a party, the plaintiff must offer evidence tending to show that the defendant knew of the political affiliation.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN9 Summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue of material fact exists for trial when, in viewing the record and all reasonable inferences drawn from it in a light most favorable to the non-movant, a reasonable jury could return a verdict for the non-movant.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN10 The movant to a summary judgment motion has the burden of establishing that there is no genuine issue of material fact. If the movant meets this burden, the non-movant must set forth specific facts that demonstrate the existence of a genuine issue for trial. Fed. R. Civ. P. 56(e).

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Evidentiary Considerations > Scintilla Rule

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN11 Fed. R. Civ. P. 56(c) mandates the entry of summary judgment against a party who fails to make a

showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial. A scintilla of evidence in support of the non-movant's position is not sufficient to oppose successfully a summary judgment motion; there must be evidence on which the jury could reasonably find for the non-movant.

Constitutional Law > Substantive Due Process > Scope

Governments > Local Governments > Employees & Officials

HN12 Protected property interests are created independent of the United States Constitution and can arise from a state statute, regulation, municipal ordinance, or an express or implied contract. While Illinois public employees have no presumptive property interest in their positions, some Illinois municipalities, including Harvey, have adopted a civil service system which provides protective rights to some, but not all, Harvey employees.

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN13 Issue preclusion is proper if four elements are met: (1) the issue sought to be precluded must be the same as that involved in the prior action, (2) the issue must have been actually litigated, (3) the determination of the issue must have been essential to the final judgment, and (4) the party against whom estoppel is invoked must be fully represented in the prior action.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN14 The "virtual representative" doctrine seeks to guarantee that a party has had an adequate opportunity to be heard; a virtual representative is one who has sufficient identity with the party in a later case that a court can be assured that the party's interests have been represented in court. The putative virtual representative must have had every reason to prosecute or defend the case as vigorously as the party to the subsequent suit. Thus, the doctrine of 'virtual representation' recognizes, in effect, a common-law kind of class action.

Evidence > Burdens of Proof > Burdens of Production

Labor & Employment Law > Discrimination > Disparate Treatment > General Overview

Labor & Employment Law > ... > Racial Discrimination > Employment Practices > Discharges

Labor & Employment Law > ... > Racial Discrimination > Employment Practices > Pattern & Practice

Labor & Employment Law > ... > Evidence > Burdens of Proof > Employee Burdens of Proof

HN15 Race discrimination claims, as a class action suit, involve a burden-shifting analysis. Plaintiffs initially have the burden of demonstrating the existence of a discriminatory termination pattern and practice. If Plaintiffs meet that burden, then plaintiffs will have made out a prima facie case of discrimination against the individual class members. The burden of production then shifts to the employer to come forth with evidence dispelling that inference.

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

Labor & Employment Law > Discrimination > Disparate Treatment > General Overview

HN16 Defendants may defeat a prima facie showing of discrimination either by producing evidence that plaintiffs' proof is inaccurate or insignificant or by providing a nondiscriminatory explanation for the apparently discriminatory result. If defendants offer a nondiscriminatory explanation (or multiple nondiscriminatory explanations), the burden of production shifts to plaintiffs to show that the employer's real reason for the adverse action was discriminatory. Plaintiffs retain at all times the burden of persuasion, i.e., the ultimate burden of proving discrimination.

Civil Rights Law > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Constitutional Law > Equal Protection > General Overview

Constitutional Law > Equal Protection > National Origin & Race

Constitutional Law > Equal Protection > Nature & Scope of Protection

Labor & Employment Law > Discrimination > Disparate Impact > General Overview

Labor & Employment Law > Discrimination > Disparate Impact > Scope & Definitions

Labor & Employment Law > ... > Disparate Impact > Employment Practices > General Overview

Labor & Employment Law > ... > Employment Practices > Selection Procedures > General Overview

Labor & Employment Law > ... > Employment Practices > Selection Procedures > Neutral Factors

Labor & Employment Law > ... > Disparate Impact > Evidence > Burdens of Proof

Labor & Employment Law > Discrimination > Disparate Treatment > Scope & Definitions

Labor & Employment Law > ... > Disparate Treatment > Evidence > Burdens of Proof

Labor & Employment Law > ... > Evidence > Burdens of Proof > Employee Burdens of Proof

HN17 Plaintiffs may prove a Title VII of the Civil Rights Act of 1964 claim of racial discrimination via one of two theories of discrimination: disparate treatment, which requires proof of discriminatory intent to treat a person or group of persons less favorably based on an impermissible factor, such as race, or disparate impact, which requires proof that a specified employment practice, although neutral on its face, has a disproportionately negative effect on members of a legally protected class. Because an Equal Protection under the United States Constitution claim requires proof of discriminatory intent, proof of a disparate impact is insufficient to support an Equal Protection claim.

Labor & Employment Law > Discrimination > General Overview

Labor & Employment Law > Discrimination > Disparate Impact > General Overview

Labor & Employment Law > Discrimination > Disparate Impact > Scope & Definitions

Labor & Employment Law > ... > Employment Practices > Selection Procedures > General Overview

Labor & Employment Law > ... > Employment Practices > Selection Procedures > Neutral Factors

Labor & Employment Law > ... > Disparate Impact > Evidence > Statistical Evidence

Labor & Employment Law > Discrimination > Disparate Treatment > General Overview

Labor & Employment Law > Discrimination > Disparate Treatment > Scope & Definitions

Labor & Employment Law > ... > Disparate Treatment > Employment Practices > General Overview

Labor & Employment Law > ... > Disparate Treatment > Evidence > Burdens of Proof

Labor & Employment Law > ... > Disparate Treatment > Evidence > Statistical Evidence

HN18 Statistics are a key means of demonstrating employment discrimination in a disparate impact or disparate treatment case. Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. In fact, where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.

Labor & Employment Law > Discrimination > Disparate Impact > General Overview

Labor & Employment Law > Discrimination > Disparate Treatment > General Overview

HN19 Statistics in disparate impact and disparate treatment cases are not entitled to reverence. Thus, defendants may rebut plaintiffs' statistical analyses, i.e., by offering more accurate statistics or by arguing that the statistical analyses are flawed. A second means of weakening a class claim based on statistics is for defendants to offer a successful rebuttal of each alleged instance of discrimination.

Civil Procedure > ... > Class Actions > Class Members > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Labor & Employment Law > ... > US Equal Employment Opportunity Commission > Civil Actions > General Overview

HN20 In a class action suit, a class member does not have to file with the Equal Employment Opportunity Commission (EEOC) as long as: (1) at least one class representative has filed with the EEOC and (2) the non-filing class member's time for filing with the EEOC was not yet over at the time that the class action suit was filed.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN21 As a general rule, a government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his

constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN22 A court considering a claim of denial or infringement of the benefits of public employment based on First Amendment of the United States Constitution activity applies a burden-shifting test. The plaintiff has the burden to show by a preponderance of the evidence that he or she engaged in constitutionally protected activity and that this conduct was a substantial factor or a motivating factor in the denial or infringement. If the plaintiff meets that prong, the burden shifts to the defendant to show by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Public Employees

HN23 Within the general prohibition against denying benefits based on a citizen's exercise of First Amendment of the United States Constitution rights is a set of rules regarding political patronage, a political practice under which public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party.

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

HN24 Where a government infringes on First Amendment of the United States Constitution interests by engaging in political dismissals or hirings, the government has the burden of showing that its actions advance an interest that is paramount and of vital importance and that the use of patronage is the least

restrictive means of advancing that interest. General claims that patronage increases governmental efficiency are not sufficient to justify the use of patronage. Similarly, arguments that patronage is somehow essential to the survival of democracy are also insufficient.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

HN25 The need for political loyalty of employees may justify the use of patronage--but only as applied to employees in policymaking positions. The term "policymaking positions" is defined very broadly because the distinction between policymaking positions, for which patronage is appropriate, and non-policymaking positions, for which patronage is inappropriate, is not clear. The inquiry focuses on the nature of the responsibilities of the position at issue, how well defined the position's responsibilities are, and whether the employee acts as an adviser or formulates plans for the implementation of broad goal. Thus, a non-policymaking, nonconfidential government employee cannot be terminated or threatened with termination based solely on his or her political beliefs.

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN26 A plaintiff meets his or her burden by showing they were terminated because of their political affiliation with a disfavored political party or because they were not affiliated with the favored political party.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN27 The ultimate inquiry regarding "policymaking" or "confidential" position is not whether the label "policymaking" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > Definition of Employees

HN28 Claims that a particular person had access to confidential information does not automatically make her a confidential employee. In addition, merely being a

supervisor/administrator is not sufficient to show that political affiliation is an appropriate requirement for the job in question.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

HN29 Qualified immunity against liability for an allegedly wrongful act is appropriate where the law rejecting the act was not clearly established at the time of the act.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN30 It has long been the law, certainly since before 1995, that an employer has the burden of showing that political affiliation is a proper job requirement for a given position and that the employer should not rely on job title or on mere access to confidential information or to a general description of a job as supervisory.

Civil Rights Law > General Overview

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > Elements

HN31 As a general rule, two members of the same corporation cannot conspire with each other in violation of 42 U.S.C.S. § 1985.

Torts > Intentional Torts > Defamation > Defamation Per Se

Torts > Intentional Torts > Defamation > Libel

Torts > ... > Invasion of Privacy > False Light > General Overview

HN32 To be considered defamatory per se, the challenged statement must be so obviously and naturally harmful to the person to whom it refers that a showing of special damages is unnecessary. Included in the categories of statements considered to be defamatory per se are language that imputes an inability to perform or want of integrity in the discharge of duties of office or employment, and language that prejudices a party, or imputes a lack of ability, in his or her trade, profession, or business.

Torts > Intentional Torts > Defamation > General Overview

Torts > Intentional Torts > Defamation > Defamation Per Quod

HN33 Special damages are required in order to state an action for defamation per quod, i.e., defamatory

statements where the defamatory character of the statement is not apparent on its face, and extrinsic facts are required to explain the defamatory meaning.

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For EZELLA BARNER, MYRTHA BARNER, JOYCE V BROWN, RONALD BURGE, BARBARAL CHALMERS, CHARLES L CLARK, RODERICK HAYNES, RUFUS A FISHER, HENRY JEFFERSON, MITCHELL VERSHER, DENARD EAVES, LEE GRAY, plaintiffs: Peter Scott Rukin, Attorney at Law, New York, NY.

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For CITY OF HARVEY, NICHOLAS GRAVES, CHRISTOPHER BARTON, PHILIP [*2] T HARDIMAN, CAMILLE DAMIANI, FRANK PIEKARSKY, DONALD WHITTED, MARY ANN SAMPSON, defendants: Lawrence Jay Weiner, Patrick J. Broncato, Scariano, Kula, Ellch & Himes, Chtd., Chicago, IL.

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For CITY OF HARVEY, NICHOLAS GRAVES, CHRISTOPHER BARTON, PHILIP T HARDIMAN, FRANK PIEKARSKY, DONALD WHITTED, MARY ANN SAMPSON, defendants: Anthony Bernard Bass, Blatt, Hammesfahr & Eaton, Chicago, IL.

Judges: David H. Coar, United States District Judge.

Opinion by: David H. Coar

Opinion

MEMORANDUM OPINION AND ORDER

Before this court is Defendants City of Harvey's ("City" or "Harvey"), Nicholas Graves' ("Graves"), Christopher Barton's ("Barton"), Phillip Hardiman's ("Hardiman"), Camille Damiani's ("Damiani"), Frank Piekarsky's ("Piekarsky"), Donald Whitted's [*3] ("Whitted"), and Mary Ann Sampson's ("Sampson") (collectively "Defendants") motion for summary judgment on Plaintiffs Ezella Barner's ("E. Barner"), Myrtha Barner's ("M. Barner"), Joyce V. Brown's ("Brown"), Ronald Burge's ("Burge"), Barbara L. Chalmers' ("Chalmers"), Charles L. Clark's ("Clark"), Roderick Haynes's ("Haynes"), Rufus Fisher's ("Fisher"), Henry Jefferson's ("Jefferson"), Mitchell Versher's ("Versher"), Denard Eaves's ("Eaves"), and Lee Gray's ("Gray") (collectively "Plaintiffs") class action complaint alleging: Violation of the *Fourteenth Amendment Due Process Clause* pursuant to 42 U.S.C. § 1983(Count I), racial discrimination in violation of the *Fourteenth Amendment Equal Protection Clause* pursuant to 42 U.S.C. §§ 1981, 1983 (Count II), retaliation in violation of the *First Amendment Free Speech Clause* pursuant to 42 U.S.C. § 1983 (Count III), civil conspiracy in violation of 42 U.S.C. § 1985(3) (Count IV), violation of 42 U.S.C. § 1986 (Count V), libel per se and false light of Burge by Graves(Count VI), failure to pay compensatory time off, sick leave, vacation time, pension benefits, and other monies due to Plaintiffs in violation of the Fair Labor Standards Act, [*4] Illinois Wage and Collection Act, and Plaintiffs' employment contracts and as retaliation in violation of the *First Amendment*, the *Fourteenth Amendment*, Title VII, 42 U.S.C. §§ 1981, 1983, and 1985(3), and the Illinois Wage and Collection Act (Count VII), racial discrimination in violation of Title VII against the City of Harvey (Count VIII), retaliation in violation of Title VII against the City of Harvey (Count IX), libel per se and false light of Eaves by Barton (Count X), and

retaliation against Eaves by the City of Harvey in violation of Title VII (Count XI).

For the reasons given below, Defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART. Summary judgment on Count I is GRANTED as to Brown, Clark, Jefferson, Versher, Haynes, and Burge and DENIED as to E. Barner, M. Barner, Fisher, Eaves, and Gray.¹ Summary judgment as to Counts II and VII is GRANTED as to Haynes and Burge and DENIED as to all other Plaintiffs. Summary judgment as to Count III is GRANTED as to Haynes, Burge, Fisher, and class members Silas and B. Moore and DENIED as to all other Plaintiffs. Summary judgment as to Counts IV and V is GRANTED as to Haynes and Burge but DENIED as to all [*5] other Plaintiffs. Count VI is DISMISSED. Summary judgment as to Counts VII and IX is GRANTED as to all class representatives other than Fisher. Summary judgment as to Counts X and XI is GRANTED. Additionally, Plaintiffs' motion to strike and Defendants' motion to strike are each GRANTED IN PART and DENIED IN PART as noted throughout the opinion. All other pending motions are MOOT.

I. General challenges to the 12(M) and 12(N) Statements

Plaintiffs and Defendants challenge each other's Rule 12 submissions (Defendants' 12(M) Statement of Undisputed Material Facts and Plaintiffs' 12(N) Statement of Additional Facts) on a number of grounds in addition to the typical fact disputes. Some of these grounds are applied to large portions of the factual statements. The court will address these grounds generically in this section of the opinion and will address the grounds individually in the Facts section of this opinion where necessary.

A. Plaintiffs' challenge to [*6] the Graves affidavit

A large number of Defendants' factual statements rely upon an affidavit given by Graves. Plaintiffs allege that some of the statements in the affidavit either contradict statements made by Graves in his deposition or else claim personal knowledge of facts that Graves disavowed personal knowledge of during his deposition. Courts are highly critical of efforts to patch up a party's deposition with his own subsequent affidavit. *Russell v. Acme-Evans Co.*, 51 F.3d 64, 67 (7th Cir. 1995). The court will disregard any statements in Graves' affidavit

¹ Chalmers was not included in Count I.

that contradict his deposition. See *id.* at 67-68 ("Where deposition and affidavit are in conflict, the affidavit is to be disregarded unless it is demonstrable that the statement in the deposition was mistaken, perhaps because the question was phrased in a confusing manner or because a lapse of memory is in the circumstances a plausible explanation for the discrepancy."). Because of the nature of this challenge to the Graves affidavit, the court will consider each challenge individually within the fact section of this opinion.

B. Defendants' challenges to depositions not taken as part of this case

[*7] Defendants challenge a number of statements supported by depositions not taken as part of this case. (See, e.g., Dft's 12(N) Resp. P 101 (challenging Arrington Dep.). Defendants' challenge, however, is misguided. **HN1** Depositions are admissible in summary judgment proceedings to establish the truth of what is . . . deposed provided, of course, that the . . . deponent's testimony would be admissible if he were testifying live." *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997). In the absence of a showing that a witness, such as Arrington, could not testify at trial to what he stated when he was deposed, the court will allow the deposition in as evidence for summary judgment.

C. Defendants' challenges to statements as based on "inadmissible hearsay"

Defendants challenge a large number of Plaintiffs' statements as based on "inadmissible hearsay." The vast majority of Defendants' "hearsay" challenges display fundamental misunderstandings of the meaning of "hearsay." Contrary to the Defendants' insinuations, not all out of court declarations are "hearsay." **HN2** *Federal Rule of Evidence 801(c)* defines "hearsay" as "a statement, other than one made by the declarant [*8] while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The vast majority of the challenged statements do not meet this definition for one of two reasons: (1) they are "legally operative statements" and not admitted for the truth of the matter asserted or (2) they are admissions of party

opponents. First, many of the statements are "legally operative statements," which are not hearsay. See, e.g., *Neal v. Honeywell, Inc.*, 995 F. Supp. 889, 893 n.4 (N.D. Ill. 1998). Included in this category of challenged statements are alleged threats made toward some of the Plaintiffs, orders given to the Plaintiffs to perform certain tasks or to remain in certain places, and statements made to the Plaintiffs terminating their employment. Many of these statements have legal effect by the mere fact of their statement. Such statements are generally not for "the truth of the matter asserted," but rather to show the fact of the statement being made and for the effect of the statement on the hearer. Thus, the fact that a threat may have been made is admissible both because of the legal effect of making a threat and for its effect on the hearer. *Id.* [*9] at 893. ² See also *Ficek v. Griffith Laboratories Inc.*, 1995 U.S. Dist. LEXIS 1153, 1995 WL 42081 n.8 (N.D. Ill. 1995) (finding that graffiti in a sexual harassment action which was material to the action were "operative words" and not offered for the truth of the matter asserted). Similarly, such statements may be relevant to the Plaintiffs' understanding of the situation, *Bieganek v. Wilson*, 1986 U.S. Dist. LEXIS 21472, 1986 WL 9192, *7 (N.D. Ill. 1986) (stating that a hearsay challenge to an "operative document" which was relevant to the "plaintiffs' knowledge and understanding" was "decidedly spurious"), and may also explain Plaintiffs' subsequent actions. *United States v. Demopoulos*, 506 F.2d 1171, 1175 (7th Cir. 1974).

Second, many of the statements challenged are [*10] admissions of party-opponents. ³ Many of the statements challenged as hearsay were made by a defendant; other statements are arguably admissions of either agents or co-conspirators of the defendants. While the court will look to the challenged statements individually, the court notes that it will consider for summary judgment purposes any admission that was made by a person who arguably was an agent or co-conspirator of one of the defendants. The court does emphasize, however, that its consideration of such statements at this stage in the litigation does not necessarily mean that the statements will ultimately be admissible at trial; Defendants, of course, remain able to challenge at trial the claim that a given declarant was their agent or co-conspirator.

² As the court in *Neal* noted, such threats may also be admissible for the truth of the matter asserted both because they contain legally operative words (which are not hearsay) and because they may be statements of the declarant's then existing state of mind. 995 F. Supp. at 893 n.4.

³ *Fed. R. Ev. 801(d)(2)* defines an admission by a party

D. "Self-serving" statements by Plaintiffs.

Defendants challenge a number of statements as "self-serving" and, thus, inadmissible. This challenge is contrary to the standards for admissibility. [*11] Where a witness has personal knowledge of a fact, that witness may testify to that fact, regardless of whether that witness has a personal interest in the fact. Thus, where a witness has personal knowledge, for example, of his or her own political support of former Mayor David Johnson, that witness may testify to that political support, even though the result of such testimony is to place that witness within the class certified in this case. Thus, there the court will only strike statements challenged as "self-serving" if they are without a basis of personal knowledge.

E. Challenges to Johnson and Graves affidavits

Both Plaintiffs and Defendants have offered affidavits from their respective mayoral candidate (Johnson for Plaintiffs and Graves for Defendants) and then challenged each other's mayoral affidavit on the ground that the mayors did not have personal knowledge about that which they are testifying. Additionally, Plaintiffs argue that some of Graves's statements in his affidavit contradict statements that Graves made in his deposition.

HN3 The general rule regarding admissibility of affidavits at summary judgment is that the affiant, like any witness in a case other [*12] than an expert witness, must only testify to matters outside his personal knowledge. Russell, 51 F.3d at 67. Additionally, where a witness's affidavit contradicts the witness's sworn deposition, the affidavit will be disregarded. Id. at 68 ("Where deposition and affidavit are in conflict, the affidavit is to be disregarded unless it is demonstrable that the statement in the deposition was mistaken, perhaps because the question was phrased in a confusing manner or because a lapse of memory is in the circumstances a plausible explanation for the discrepancy."). See also McCarthy v. Kemper Life Insurance Co., 924 F.2d 683, 687 (7th Cir. 1991) (A party "cannot effectively oppose a motion for summary judgment by contradicting his own deposition testimony.").

Defendants argue that Graves is presumed to have personal knowledge as an officer of the City of Harvey. There is no Seventh Circuit precedent in support of this claim, and the Fifth Circuit cases cited by Defendants are inapposite. Dalton v. Federal Deposit Insurance

Corp., 987 F.2d 1216, 1223 (5th Cir. 1993) (admitting affidavit of FDIC account officer where account officer did not have personal knowledge when given [*13] transaction occurred but learned of it later; noting that all relevant documents forming the basis of the FDIC account officer's testimony were attached to the affidavit); Federal Savings & Loan Insurance Corp. v. Griffin, 935 F.2d 691, 702 (5th Cir. 1991) (admitting affidavit of senior bank attorney where affidavit demonstrated attorney's "personal knowledge to testify as a custodian of documents," where attorney had personal knowledge about some of the statements, and where all hearsay statements came within the business records exceptions and were supported by business records attached to the affidavit), cert. denied, 502 U.S. 1092, 112 S. Ct. 1163, 117 L. Ed. 2d 410 (1992). These cases in no way support a general claim that Graves can be presumed to have personal knowledge of everything that occurs within his government. In fact, two other judges on this court have rejected affidavits by corporate officers where the affiant officers failed to demonstrate personal knowledge. See First National Bank of Louisville v. Continental Illinois National Bank and Trust Co. of Chicago, IL, 1989 U.S. Dist. LEXIS 15043, 1989 WL 157276, *1 (N.D. Ill. 1989) (Conlon, J.); Monroe v. United Air Lines, Inc., 1981 [*14] WL 268, (N.D. Ill. 1981) (Shadur, J.). Even if such a presumption existed, surely that presumption would be rebutted by Graves's admissions in his deposition that he lacked personal knowledge on a variety of the statements to which he attested in this affidavit. Similarly, Defendants' general claim that Graves *could have* attained personal knowledge of these facts between the time that he was deposed and the time that he signed his affidavit is of no use to them; Graves does not attest in his affidavit that he gained personal knowledge after his deposition and, indeed, offers no facts even indicating that he personally attained any knowledge.

F. Violations of Rule 26(a)

1. Defendants' failure to disclose evidence pursuant to Rule 26(a)(5)

Plaintiffs argue that certain statements should be excluded because Defendants failed to disclose the facts and evidence relating to those statements pursuant to Plaintiffs' written interrogatories. Plaintiffs' Interrogatory 23 states (in pertinent part):

For each Plaintiff whom Defendants claim his or her position was eliminated state the following:

a. each and every reason why each named Plaintiff was selected [*15] for layoff or elimination of his or her position or termination;

b. each and every person who made the decision or provided input into the decision to layoff or eliminate the position of or terminate each person identified in (a). With respect to each person identified:

i. Identify the documents each person identified in (b) above relied on or reviewed and the written or oral communications each person relied on, reviewed or participated in when controlling, reviewing, contributing to, recommending, or otherwise affecting or participating in the decision to layoff, eliminate the position of, or terminate each person identified in (a).

Defendants responded to Interrogatory 23 but did not include any mention of oral or written communications or documents regarding debts owed to Groen Waste Services, Illinois Department of Employment Security, Pinnacle Bank, Humana HMO, and American HMO. (See Dfts' 12(M) Stmt. PP 27-31 (citing to Graves aff. regarding debts).) Defendants had a duty under Fed. R. Ev. 26(a)(5) to respond to Plaintiffs' written interrogatories and a duty under Fed. R. Civ. P. 26(e)(1) "to supplement at appropriate intervals its disclosures under [*16] [Fed. R. Civ. P. 26(a)] if [Defendants learned] that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to" Plaintiffs through the discovery process. **HN4** Under Fed. R. Civ. P. 37(a), a "party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." ⁴ See also McNabola v. Chicago Transit Authority, 10 F.3d 501, 517 (7th Cir. 1993) (stating that failure to disclose documents justified exclusion of the documents). Rule 37(a)'s "sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule

26(a) was either justified or harmless." Salgado v. General Motors Corporation, 150 F.3d 735, 742, 1998 WL 409926, *5 (7th Cir. 1998) (citing Finley v. Marathon Oil Co., 75 F.3d 1225, 1230 (7th Cir. 1996)). Defendants have failed to establish either that its violation of Rule 26(a) and (e)(1) was justified [*17] or harmless. Accordingly, Plaintiffs' Motion to Strike Graves's Affidavit is GRANTED IN PART and those statements in Graves's Affidavit and in Defendants' 12(M) Statements regarding the excluded evidence shall not be taken into consideration.

2. Plaintiffs' failure to designate witness as an expert pursuant to Rule 26(a)(2)

HN6 Rule 26(a)(2) requires parties to "disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of [*18] Evidence." Fed. R. Civ. P. 26(a)(2)(A). Plaintiffs did not disclose to Defendants any such expert testimony during the discovery period, but did attach a declaration by Michael S. Friedman to summaries prepared by Friedman that placed the City of Harvey personnel records into a database configuration. (See Plaintiffs' Ex. 2 (Friedman database summaries).) As Friedman's declaration makes clear, he is not acting as an expert in this case but, instead, acted solely to summarize voluminous documents "in the form of a chart, summary, or calculation," pursuant to Fed. R. Ev. 1006. His declaration includes no analysis of the data but instead explains the sources of his information and an attestation to the accuracy of the data as compared to the original documents. As Plaintiffs did not violate Rule 26(a)(2), Rule 37's exclusion principle does not apply.

G. Other Local Rule 12(M) and 12(N) issues

1. Local Rule 12(M) and 12(N) violations

HN7 The Local Rules for the Northern District of Illinois require a party submitting a motion for summary judgment to submit a "statement of material facts as to which the moving party contends there is no genuine issue and that entitle [*19] the moving party to a judgment as a matter of law . . ." Local Rule 12(M). Local Rule 12(N) states that "all material facts set forth in the

⁴ Notably, **HN5** while Rule 37(c)(1) states that additional sanctions "may" be imposed "on motion and after affording an opportunity to be heard," Rule 37(c)(1) makes exclusion of evidence a more automatic sanction and does not require the court to afford the nondisclosing party an opportunity to be heard. Because Plaintiffs addressed exclusion of this evidence in their Motion to Strike, Defendants did have an opportunity to be heard on exclusion of the evidence -- but failed to offer any response.

12(M) statement will be deemed to be admitted unless controverted in the [12(N)] statement." Moreover, the party defending against summary judgment must point to specific portions of the record in support of its interpretation of the case, or the facts will be deemed admitted. See *Valenti v. Qualex, Inc.*, 970 F.2d 363, 369 (7th Cir. 1992) ("A Rule 12 responsive statement that is a flat denial, without reference to supporting materials, or with incorrect or improper references, and containing irrelevant additional facts, has no standing under Rule 12(N)."). See also *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 921-22 (7th Cir. 1994) (observing that the Seventh Circuit has "repeatedly upheld the strict enforcement of [Local District Rules 12(M) and 12(N)], sustaining the entry of summary judgment when the non-movant has failed to submit a factual statement in the form called for by the pertinent rule and thereby conceded the movant's version of the facts."). Both parties have raised challenges to their opponent's 12(M) and 12(N) statements [*20] and responses. The court will disregard any statements or responses by either party which do not meet the standards of Local Rules 12(M) and 12(N). However, where the court can track the statement to the underlying supporting materials, the statement will be considered..

2. Statements of facts regarding civil service requirements

Each of the parties (and Plaintiffs in particular) state a number of facts regarding the civil service requirements. The civil service requirements are not, however, an issue of fact, but, instead are an issue of law. While the court will note in the Facts section of this opinion facts regarding the individual Plaintiffs, which might be relevant to the ultimate determination of whether a given Plaintiff was covered by the protections of civil service, the court will consider the nature and requirements of civil service in the City of Harvey in the Analysis section of the opinion.

3. Statements of fact regarding political affiliation

"HN8 In a case where a plaintiff asserts his own rights in an attempt to establish a *First Amendment* claim in an employment context, he must present evidence that his speech (or conduct) was constitutionally protected [*21] and that it was a substantial factor in his demotion." *Shanahan v. City of Chicago*, 82 F.3d 776, 780 (7th

Cir. 1996). In a case, such as this one, where Plaintiffs claim that they were fired because of their political affiliation with a party, Plaintiffs must offer evidence tending to show that Defendants knew of their political affiliation. *Id.* at 781. See also *Bosques v. Kustra*, 1994 U.S. Dist. LEXIS 16292, 1994 WL 866083, *8 (N.D. Ill. 1994) (requiring plaintiff to show knowledge of political non-affiliation where plaintiff alleged discrimination based on non-affiliation with current administration). Plaintiffs cannot meet this burden of production merely by offering "hearsay statements from persons Plaintiff[s] were] unable even to identify by name. *Bosques*, 1994 WL 866083 at *8. Similarly, it is not sufficient to make conclusory allegations about being "well known" as politically affiliated with a party or political candidate. *Cusson-Cobb v. O'Lessker*, 953 F.2d 1079, 1081 (7th Cir. 1992). In view of these requirements, the court will disregard any conclusory statements made by Plaintiffs claiming that Defendants knew or should have known of their political affiliation and will only consider [*22] evidence offered by Plaintiffs that affirmatively tends to show that Defendants knew of Plaintiffs' political affiliation.

3. Statements of fact regarding after-acquired evidence

Defendants offer evidence about Harvey's financial condition acquired after the various decisions to terminate Plaintiffs. Under the after-acquired evidence rule, such evidence is not admissible to prove that Defendants fired Plaintiffs for a legitimate business reason. See *McKennon v. Nashville Business Publishing Co.*, 513 U.S. 352, 360, 115 S. Ct. 879, 885, 130 L. Ed. 2d 852 (1995) ("The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason."). See also *Kristufek v. Hussmann Foodservice Co., Toastmaster Division*, 985 F.2d 364, 369 (7th Cir. 1993) ("A discriminatory firing must be decided solely with respect to the known circumstances leading to the discharge. The deterring statutory penalty is for retaliatory firing, the character of which is not changed by some after discovered reason for discharge which might otherwise have been used, but was not.").⁵ Thus, the court will not consider any [*23] after-acquired evidence in this motion.

II. Facts

⁵ Where an employer offers after-acquired evidence that would justify a termination (as is true here), front pay and reinstatement is inappropriate. *McKennon*, 513 U.S. at 362, 115 S. Ct. at 886. After-acquired evidence does not bar an employee's claim to back pay but does limit the amount of back pay to the period from the time of termination to the date

Plaintiffs state that "other than agreeing that there was an election and that Johnson is no longer Mayor of Harvey, the parties agree on little else." (Ptf's Resp. Mem. at 2.) As hyperbolic as that sounds, it comes close to being the absolute truth: Plaintiffs and Defendants dispute bitterly the vast majority of the 600+ fact statements offered by the two sets of parties.

A. Events

1. The parties and other relevant persons

[*24] Plaintiffs, Ezella Barner ("E. Barner"), Myrtha Barner ("M. Barner"), Joyce V. Brown ("Brown"), Ronald Burge ("Burge"), Barbara L. Chalmers ("Chalmers"), Charles L. Clark ("Clark"), Rufus Fisher ("Fisher"), Henry Jefferson ("Jefferson"), Mitchell Versher ("Versher"), Denard Eaves ("Eaves"), and Lee Gray ("Gray") (collectively "Plaintiffs") are all former employees of Defendant the City of Harvey ("Harvey") and are all African-Americans. (Dfts' 12(M) Stmt. P 1.) Defendant Graves is currently the Mayor of Harvey, having defeated former Mayor Johnson in the April 4, 1995 election; Graves is white. (Dfts' 12(M) Stmt. P 2; Ptf's 12(N) Stmt. PP 2-3.) Defendant Christopher Barton ("Barton") is the current Deputy Chief of Police of the Harvey Police Department; Barton is African-American (Dfts' 12(M) Stmt. P 3.) Defendant Philip Hardiman ("Hardiman") is the current Chief of Police of the Harvey Police Department; Hardiman is African-American. (Dfts' 12(M) Stmt. P 4.) Defendant Camille Damiani ("Damiani") is the current Commander for the Office of Professional Standards for the Harvey Police Department. (Dfts' 12(M) Stmt. P 5.) Defendant Alderman Frank Piekarski ("Piekarski") is currently [*25] an alderman in Harvey; Piekarski is white. (Dfts' 12(M) Stmt. P 6.) Defendant Alderman Donald Whitted ("Whitted") is currently an Alderman in Harvey; Whitted is African-American. (Dfts' 12(M) Stmt. P 7.) Defendant Alderman Mary Ann Sampson is currently an Alderman in Harvey; Sampson is African-American. (Dfts' 12(M) Stmt. P 8.) John Arrington ("Arrington"), Gloria Taylor ("Taylor"), and Eric Kellogg ("Kellogg") are also Aldermen in Harvey; they are all African-American. (Dfts' 12(M) Stmt. P 9.)

Defendant Harvey is a municipal government organized under the laws of the state of Illinois. (Dfts' 12(M) Stmt. P 10.) As a "home rule" unit of local government, Harvey may exercise certain powers and perform certain functions pursuant to Article VII, § 6(a) of the 1970 Constitution. (Dfts' 12(M) Stmt. P 10.) The government of Harvey includes a City Council, a Mayor (with a staff of assistants and secretaries), and six departments: Police, Fire, Water, Streets, Planning, and Accounts and Finances. (Dfts' 12(M) Stmt. P 11.) Harvey also has a Civil Service Commission, comprised of three members appointed by the Mayor. (Dfts' 12(M) Stmt. P 12.) The population of Harvey in 1995 (the relevant [*26] year in this case) was approximately 30,000 people. (Dfts' 12(M) Stmt. P 13.)

2. Background facts

a. The April 1995 election

Former Mayor Johnson was elected Mayor in April 1983 and subsequently re-elected in 1987 and 1991. (Dfts' 12(M) Stmt. P 15; Ptf's 12(N) Stmt. PP 1-2.) Johnson was defeated by the present mayor, Graves, in the election on April 4, 1995. (Dfts' 12(M) Stmt. P 15; Ptf's 12(N) Stmt. P 3.)⁶ At the time of the election in April of 1995, the racial composition of Harvey was 85.5% African-American and 13.9% White. (Dfts' 12(N) Resp. P 4.) The parties agree that the election was very heated. (Ptf's 12(N) Stmt. P 6; Dfts' Ex. 81 (Graves Supp. Aff.) P 4.) One Harvey alderman stated that in the mayoral election "it seemed like it was -- everything was based on race," that Graves and his supporters harassed Johnson supporters, and that fights broke out in polling places and derogatory comments were made. (Ptf's 12(N) Stmt. P 6; Kellogg Dep. at 7-8.) Graves states that "the tone of the campaign [was not] out of the ordinary" and that he neither directed that his supporters harass anyone nor made any comments regarding race in the election. (Dfts' Ex. 81 (Graves [*27] Supp. Dep.) P 4.) Graves was sworn in as Mayor of Harvey on April 13, 1995. (Ptf's 12(N) Stmt. P 7.)⁷

The parties disagree about the atmosphere in Harvey after the election. Plaintiffs allege that [*28] City Council

that the evidence was acquired. *Id.* Such damages issues are not at issue in the current motion, which seeks summary judgment on the question of liability.

⁶ Dfts' 12(M) Statement PP 16-19 are immaterial; Harvey's finances prior to Johnson's tenure and who had control of the budget is irrelevant to the issue of Plaintiffs' termination.

⁷ Plaintiffs seek to include statements regarding the atmosphere in Harvey after the election. (See Ptf's 12(N) Stmt. P 9.) Defendants correctly point out that several of the statements are either hearsay, without identification of the declarants, or are made without any showing of foundation, or both. The remaining statement, that "an alderman started a fund for

meetings were disruptive, that there was a heavy police presence at the meetings, including intimidation of persons who spoke against Graves, and that Graves physically attacked an alderman who had supported Johnson and harassed for being "one of the former mayor's political friends." (Ptfs' 12(N) Stmt. P 10.) Defendants dispute these allegations, citing to affidavits from Graves and Barton. (Dfts' 12(N) Resp. P 10.) Graves admitted in his deposition that there were "heated debates" in the City Council about whether Graves was racist. (Dfts' Ex. 74 (Graves Dep.) at 31-32.)

4 (Johnson Dep.) at 91, 93); by April 1995, the employees laid off in October 1994 were rehired as a result of Harvey's improved fiscal condition, (Ptfs' 12(M) Resp. P 20; Dfts' Ex. 4 (Johnson Dep.) at 93-94), and the pay cut was removed as of October 28, 1994. (Ptfs' Ex. 31 (Johnson Dep., *Blair v. City of Harvey*)).⁸ Harvey's appropriation ordinance from [*29] the 1994-95 budget year, signed by Johnson on July 28, 1994, indicates that expenditures had exceeded revenue by \$ 631,906.70. (Dfts' 12(M) Stmt. P 24; Ptfs' 12(M) Resp. P 24; Dfts' Ex. 7 (1994-95 appropriation ord.) at 16.)

b. Harvey's economic situation

Harvey had a budget deficit in 1994 that necessitated the layoff of some Harvey employees on October 7, 1994 and led Harvey to ask employees to take reductions in pay (Dfts' 12(M) Stmt. PP 20-21; Dfts' Ex.

[*30] Graves states that one of his goals was to increase⁹ [*31] the number of patrol officers. (Dfts' 12(M) Stmt. P 32.)¹⁰ [*32] The parties disagree about the number of sworn patrol officers during the relevant time period. Plaintiffs state that the number of sworn

persons set up and illegally charged by Graves and his white police officers," has not been shown to be materially relevant, i.e., to the issue of whether Graves and his alleged co-conspirators fired or constructively discharged persons within the plaintiffs' class.

⁸ Defendants' 12(M) Stmt. P 23 claims that Graves, as treasurer, knew about Harvey's financial condition and citing to Graves's affidavit P 11. This claim, however, is contradicted by Graves's deposition testimony:

Q. What was your job as city treasurer?

A. Nothing because they wouldn't let me look at any checkbooks. Took all the books away. Took my authority away to go to the bank to even check on the accounts.

Q. Who's 'they'?

A. David Johnson.

....

Q. And when did they stop letting you be the treasurer?

A. They didn't stop letting me be the treasurer. They just shut me off. Had no office, couldn't go to the bank, could get no records, could look at no checkbooks. I continued to be city treasurer, but I couldn't treasure.

(Dfts' Ex. 74 (Graves Dep.) at 246, 247). Having stated that, as treasurer, he had no ability to gain personal knowledge about the financial condition of the City of Harvey -- no access to the checkbooks, books, records, and accounts of the City of Harvey -- Graves's conclusory statement that he was "aware" of Harvey's financial condition as treasurer will be disregarded as contradictory to his deposition testimony..

⁹ Graves makes a number of statements about the police department prior to him taking office, (Dfts' 12(M) Stmt. P 33; Dfts' Ex. 1 (Graves Aff.) P 19), but offers no basis for his personal knowledge of such details as overtime pay, staffing of the department, and patrol shifts at a time when he was a member of or in charge of either the police department or mayoral office of the City of Harvey.

¹⁰ Defendants' 12(M) Stmt. P 32 also states that Graves "faced an admitted budget deficit." (Dfts' 12(M) Stmt. P 32 (citing Dfts' Ex. 1 (Graves Aff.) P 20.) This is in contradiction to Graves's deposition, where he stated that financial records were in a mess when he got into office, that the administration "knew to some extent, but we didn't know how extensive the amount of money the city owed and what we had in the bank," that records were missing and "to this day -- there's probably things that we don't know is missing that's missing." (Dfts' Ex. 74 (Graves Dep.) at 130-32.) Graves also admitted that Thomas Setchell ("Setchell") was the person who came in, "checked out all the accounts and found out where the money was, what we had, what we didn't have, what was due, what was owed. I mean, we knew to some extent, but not to the --" (Dfts' Ex. 74 (Graves Dep.) at 135-36.) Graves admits that Setchell was not hired until July 3, 1995. (Dfts' Ex. 1 (Graves Aff.) at P 29.) Finally, Graves admitted to a *Harvey Star* reporter on April 16, 1995, "First thing we have to find out is where we're at

police officers (patrol and supervisory) was 56 in the first week of April, 1995, 61 in August 1995, and 57 in October 1995. (Ptf's 12(N) Stmt. P 32 (citing Ptf's Ex. 2G (Police Department study)).) Defendants state that 47 sworn police officers were receiving pay for active duty on April 3, 1995, and that 63 sworn police officers were receiving pay for active duty on September 15, 1995. (Dfts' 12(N) Resp. P 32 (citing Freeman Aff., PP 10-11).)¹¹ Plaintiffs also state that the police department workforce changed from 75% African-American to 57% African-American between April and October 1995. (Ptf's 12(N) Stmt. P 34.)

Graves states that he, along with his administrative assistant, Nick Forte ("Forte"), began to examine the positions in Harvey city government which might be expendable in order to enable Graves to increase the size of the police force; Graves gives no timeframe for when this examination took place. (Dfts' 12(M) Stmt. P 34.) Defendants admit that the terminations of Harvey city employees began April 17, 1995, the day after Graves took office. (Ptf's Ex. 4 (Harvey list of employees).) Graves also states that the decisions to abolish positions [*33] were based on Harvey's budget and the need for the position, that positions were abolished in all non-public safety departments of Harvey

government, and that neither race nor political patronage was considered in determining which positions to abolish. (Dfts' 12(M) Stmt. P 35-36.)¹² Defendants admit that there was no set procedure for determining whom to lay off post-election. (Ptf's Ex. 10 (Dfts' Resp. to Interrog) No. 24.) On various dates in April and May 1995, Graves sent most employees who were laid off the following termination letter:

A review of the current budget and cash on hand in the City indicates that there is a serious shortfall of revenue. Due to this shortfall, we are forced to make drastic personnel cuts. You are hereby advised that your position with the City of Harvey is hereby terminated. We thank you for your past service to the City.

(Dfts' 12(M) Stmt. P 37.) Decisions were made to terminate personnel employed in the Accounts and Finance, Planning, Water, and Streets Departments, as well as in the Mayor's Office. (Dfts' 12(M) Stmt. P 38.) None of the employees in these Departments had taken civil service examinations. (Dfts' 12(M) Stmt. P 38.)

[*34] The following is a list of persons who received budget cut letters by name, race, and date:

Name	Race	Date of letter of termination
Cornelius Marshall	African American	4-17-95
George Brewton	African American	4-17-95
Herschel Dungey	African American	4-17-95
Phyllis Smallwood	African American	4-17-95
Donald Nesbit	African American	4-17-95
Ron Ayers	African American	4-17-95
Sarah Bell	African American	4-17-95
Chuck Givines	African American	4-17-95
Henry Jefferson	African American	4-18-95
Patsy Ross-Truitt	African American	4-18-95
Eric Glenn	African American	4-18-95
Robert Montgomery	African American	4-18-95
Henry Murphy	African American	4-18-95
Tonia Humphrey	African American	4-18-95

money wise. The books haven't been brought up to date for over a year. We don't know if we're a dollar in debt or \$ 20 million in the hole." (Ptf's 12(N) Stmt. P 291. See also Dfts' 12(N) Resp. P 291 (admitting Graves's statement; stating "that when Graves took office, the audit for the 1994 fiscal year had not been completed. . .").

¹¹ Defendants object to Plaintiffs' Exhibits 2A-2G (Friedman summary of voluminous documents) on the grounds that they are not supported by the documents but do not offer any citation to the voluminous documents in order to challenge Friedman's summary. Similarly, Defendants cite to Freeman's affidavit as stating the correct numbers, but did not attach to Freeman's affidavit the documents supporting her argument or any documents indicating that her claim, as opposed to Friedman's summary, is correct. Thus, this is a factual dispute best left to the jury.

¹² Plaintiffs dispute this claim; to the extent that this claim simply states what Graves's testimony is, it is admissible. The court will consider all of the relevant evidence in determining whether Plaintiffs' race and political affiliation claims survive summary judgment.

Name	Race	Date of letter of termination
Bonnie Rateree	African American	4-18-95
Alvin Welch	African American	4-19-95
Arnold Tate	African American	4-20-95
Kerry Skurlock	African American	4-21-95
Rufus Fisher	African American	4-24-95
Barbara Chalmers	African American	4-28-95
Jeannetta McClellan	African American	4-28-95
Brenda Smith	African American	4-28-95
Debra Brown	African American	4-28-95
Renea Gholson	African American	4-28-95
Gilvonne Davis	African American	4-28-95
James Dixon	African American	4-28-95
Kevin Lindley	African American	5-08-95
Denise Kellogg	African American	5-09-95
Claude Rials	African American	4-28-95
Sandra Isom	African American	6-02-95

[*35] (Ptf's 12(N) Stmt. P 15.) All 30 of the persons who received the termination letters were supporters of Johnson who worked for his campaign in some capacity. (Ptf's 12(N) Stmt. P 16.)

12(N) Stmt. P 12.) Thomas Setchell ("Setchell") was hired on July 3, 1995 to determine what [*36] was in Harvey's account and what was owed. (Ptf's 12(N) Stmt. P 13.)

Plaintiffs dispute Graves's claim that he made these decisions based on budgetary considerations or on a review of relevant documents. Defendants admit that when Graves assumed office on April 13, 1995, City Hall was a "chaotic mess," financial records were missing, papers were scattered everywhere, and Graves did not know what was missing. (Ptf's 12(N) Stmt. P 12.) Graves admitted at his deposition in November 1997 that "we still hadn't figured it out." (Ptf's

B. Changes in employment in Harvey's departments and mayor's office

1. Accounts and Finance Department

According to Harvey's personnel records, the following persons were employed in the Accounts and Finances Departments prior to the Graves administration taking office:

Employee	Position	Hire Date	Race
Sarah Bell	Controller	11-28-94	B
Tamara Cannon	Clerk	11-09-93	B
Teresa Dixon	A.P. Manager	05-24-93	B
Hershel Dungey	Personnel Dir.	11-09-92	B
Sandra Isom	Clerk	02-21-95	B
Camille Krencjarz-Soria	Clerk	08-31-87	W
Lorita Landa	Clerk	07-16-91	B
Oline Lanier	Secy/Pers.	08-02-94	B
Kathryn Leon	Accountant	05-04-92	B
Jeanetta McClellan	Clerk	02-28-95	B
¹³ Latresa Moore	Clerk	04-25-94	B
Henry Murphy	Pur. Agent	02-14-94	B
Patsy Ross-Truitt	Office Manager	04-03-95	B

(Ptf's Ex. 4 (Harvey empl. recs).) Out of the 13 employees, 12 were African-American (92.3%) and 1 was Caucasian (7.7%). After the Graves Administration took office, between April 17, 1995, and June 21, 1995, 8 employees, all African-American, either were terminated [*37] or resigned; these employees were

¹³ Plaintiffs dispute that Moore was employed by the Finance and Accounting Departments but instead state that she was a member of the Water Department. However, in their own 12(N) Statement, Plaintiffs specifically state that Moore was a clerk in the Finance and Accounting Department. (See Ptf's 12(N) Stmt. P 18.)

Bell (terminated), T. Dixon (resigned), Dungey (terminated), Isom(terminated), McClellan (terminated), Moore (terminated), Murphy (terminated), and Ross-Truitt (terminated). (Ptf's Ex. 4 (Harvey empl. recs); Dfts' Ex. 9 (budgetary termination letters); Dfts' 12(M) Stmt. PP 41-53.) The Graves Administration has hired 4 employees for the department:

Employee	Position	Hiring	Race
Christine Ceja	Clerk	07-17-95	H
Hilda Esperanza	Clerk/Trans 7/97	04-29-96	H
Scott Senour	Clerk	12-04-95	W
Thomas Setchell	Finance Director	07-03-95	W

(Ptf's Ex. 4 (Harvey empl. rec.)) By the end of the class period, there were 7 employees in the department, including 4 African-Americans (57.1%), 1 Hispanic (14.3%), and 2 Caucasians (28.6%). Thus, on April 29, 1996, there were 9 employees in the department, including 4 African-Americans (44.4%), 2 Hispanics (22.2%), and 3 Caucasians (33.3%). Since April 29, 1996, 3 African-Americans (Landa, Lanier, and Leon) and 1 Caucasian (Senour) have left their employment; this leaves 5 employees in the Department, 1 African-American (20%), 2 Hispanics (40%), and 2 Caucasians (40%).

[*38] Of the six clerks employed by the Johnson administration on April 4, 1995 (Tamara Cannon, Sandra Isom, Camille Krencjarz-Soria, Lorita Landa, Jeanetta McClellan, and Letresa Moore); Krencjarz-Soria is Caucasian, and the other five are African-American. (Ptf's 12(N) Stmt. P 18-19.) Isom, Moore, and McClellan (all African-American) were terminated within two months of Graves taking office. (Dfts' 12(N) Resp. P 19.) Krencjarz-Soria, who is Caucasian and a Graves

supporter, was elevated to be Office Manager; Teresa Dixon ("T. Dixon"), who is African-American and a Johnson supporter, states that she was demoted from Office Manager to Accounts Payable Manager, harassed by Krencjarz-Soria, and ultimately resigned due to the harassment. (T. Dixon Decl. at PP 3-4.) Landa, who is African-American and a Graves supporter, was retained in the department; T. Dixon states that she was forced to train Landa to take over Dixon's position as Accounts Payable Manager. (T. Dixon Decl. at P 5.) Defendants admit that Setchell, the Caucasian man hired as Finance Director, performs similar duties to those that Bell performed as Harvey's Comptroller. (Dfts' 12(M) Stmt. P 41.) Defendants admit that Dominic [*39] Forte ("Forte"), performs similar duties to those that Dungey performed as Harvey's Personnel Director. (Dfts' Ex. 1 (Graves Aff.) P 32.)

2. Planning Department

According to Harvey's personnel records, the following persons were employed in the Planning Department prior to the Graves administration taking office:

Employee	Position	Date Hired	Race
Robert Ackerman	Bldg. Insp.	02-23-87	W
Debra Brown	Secretary	09-15-94	B
Leonard Campbell	Sr. Bldg. Insp.	01-01-75	B
Violetta Cullen	Sr. Planner	08-29-94	B
Christine Davis	Lot Alley Insp.	02-25-81	B
Renee Gholson	Health Insp.	05-01-84	B
Eric Glenn	Planner	08-29-94	B
Robert Montgomery	Planner	08-29-94	B
Art Neeley	Code Insp.	10-05-92	B
Ethelia Robertson	Secretary	11-23-87	B
Kerry Scurlock	Health Insp.	01-11-93	B
Phyllis Smallwood	Hous. Adm.	07-09-91	B
Brenda Smith	TRP	08-23-93	B
Valentine Lawanda	Adm. Asst.	07-02-91	B

(Ptf's Ex. 4 (Harvey Empl. Rec.)) Prior to the Graves Administration taking office, there were 14 employees in the Planning Department, including 13 African-Americans (92.8%) and 1 Caucasian (7.1%). Between April 17, 1995, and April [*40] 28, 1995, the

Graves Administration terminated 8 employees, all African-American, including Brown, Gholson, Glenn, Montgomery, Neeley, Scurlock, Smallwood, and Smith. (Ptf's Ex. 4 (Harvey Empl. Rec.)) The Graves Administration hired 4 employees for the Planning

Department between April 24, 1995 and August 15, 1995:

Employee	Position	Hire Date	Race
Theresa Alderson	Building & Zone Sec'y	05-01-95	B
Judy Seput	Sec'y	08-15-95	W
Linda Siller	Asst. Admin.	05-15-95	B
Brenda Thompson	Dir. Planning	04-24-95	B

(Ptfs' Ex. 4 (Harvey Empl. Rec.)) Thus, at the end of the class period, there were 11 employees in the Planning Department, 9 African-American (81.8%) and 2 Caucasian (18.2%). In the time after the class period closed, 2 African-Americans and 1 Caucasian have been terminated or resigned, 1 Caucasian has transferred out of the Planning Department, and 2 African-Americans (Tawana Ashley, a secretary, and Joseph Frierson, a planner) and 1 Caucasian (Richard Gini, Fire and Building Inspector) have been hired. Thus, there are now 10 employees in the Planning Department, including 9 African-Americans (90%) and 1 Caucasian (10%).

Defendants [*41] allege that Gholson was terminated and her position abolished on April 28, 1995 for failing to return to work after Graves took office (Dfts' 12(M) Stmt. P 61 (citing Dfts' Ex. 1 (Graves Aff.) P 50).) Graves offers no basis for personal knowledge of Gholson's attendance record, and Gholson disputes the claim that she failed to attend work and notes that she was one of

the employees terminated with a letter claiming budgetary reasons. (Gholson Decl. P 4.) The four employees hired by the Planning Department during the class period were all either Graves supporters or related to Graves supporters. (See Dfts' Ex. 74 (Graves Dep.) at 87 (stating that Thompson and Seput were Graves supporters and that Siller is Thompson's sister); *id.* at 93 (noting that Bill Alderson was a Graves supporter); Johnson Decl. P 20 (noting that Theresa Alderson is the daughter-in-law of Bill Alderson and that she is also a Graves supporter).) Plaintiffs also challenge the hiring of Alderson as a "Building & Zone Secretary" when other secretaries in the Department were terminated. (Ptfs' 12(N) Resp. P 70.)

3. Mayor's Office

According to Harvey's personnel records, the following persons were employed [*42] in the Mayor's Office prior to the Graves administration taking office:

Employee	Position	Hiring Date	Race
Rita Allen	Secretary	04-11-94	B
Cheryl Anderson	Deputy Clerk	04-23-91	B
Ron Ayers	Pub. Rel. Dir.	08-22-94	B
Barbara Chalmers	Confidential Sec.	06-02-94	B
Gwendolyn Davis	City Clerk	05-3-91	B
Robin Denson-Williams	Part-time	01-09-95	B
Emma Foreman	Part-time	09-26-94	B
Tonia Humphrey	Asst. Pub. Rel. Dir. PT	02-28-95	B
Trense Ketchum	Cable (Part-time)	12-03-93	B
C. Marshall	Attorney	07-06-93	B
Michelle McHenry	Part-time	05-19-94	B
Jessie Pickett	Cable (Part-time)	08-01-94	B
Dorothy Prazes	Mayor's Recep.	12-19-94	B
Lamond Taylor	Admin. Aide/Rec. Clerk	03-01-93	B
Jake Williams	Cable (Part-time)	12-03-93	B

(Ptfs' Ex. 4 (Harvey Empl. Rec.)) Prior to the Graves Administration taking office, there were 15 employees in the Mayor's Office, and all were African-American. Of these 15 employees, 11 were separated from employment with Harvey between April 17, 1995 and July 21, 1995: Ayers (terminated, budget letter), Allen

(terminated), Chalmers (terminated), Denson-Williams (terminated), Foreman (terminated), [*43] Ketchum (resigned), Marshall (terminated), McHenry (terminated), Prazes (resigned), and Taylor (terminated, reduction).¹⁴ Also during the class period, the Graves Administration hired nine employees:

Employee	Position	Date hired	Race
Bill Alderson	Pub. Rel. Dir. (PT)	04-17-95	B
Kim Bishop	Part-time	08-28-95	B
David Dillner	Attorney	05-29-95	W
Erania Dunn	Research Dir.	04-17-95	B
Nick Forte	Admin. Aid	04-14-95	W
Iris Hagans	Part-time (Cable)	05-29-95	W
Gloria Morningstar	Treasurer	04-17-95	W
Sandra Torres	Exec. Asst.	05-23-95	H
Hope Webster	Exec. Asst.	05-01-95	H
Dwain Whitted	Cable (Part-time)	05-12-95	B

(Ptf's Ex. 4 (Harvey Empl. Rec.)) Hagans resigned before the end of the class period. (Dfts' 12(M) Stmt. P 92.) Thus, at the end of the class period, there were 12 employees in the Mayor's Office, including 7 African-Americans (58.3%), 3 Caucasians (25%), and 2 Hispanics (16.7%). After the class period ended, Jake Williams resigned, leaving 11 employees in the Mayor's Office, 6 African-Americans (54.5%), 3 Caucasians (27.3%), and 2 Hispanics (18.2%).

[*44] The parties disagree sharply about a number of the terminations and subsequent hirings. Defendants allege that Ayers was terminated for failing to attend work, but have admitted that he was one of the persons terminated with a letter citing budgetary reasons; their only source for claiming that Ayers failed to attend work is

Graves's affidavit. (Dfts' 12(M) Stmt. P 77.) Defendants allege that Allen was secretary to the Chief Administrative Officer and that her position was abolished, while Plaintiffs state that Allen's title was "secretary" and note that other persons were hired to act as secretaries or clerks. (Dfts' 12(M) Stmt. P 78; Ptf's 12(M) Resp. P 78.) While Plaintiffs' dispute the claim that Chalmers was a "confidential secretary," as opposed to a "secretary," they cite to no materials; they do note that Webster, her replacement, was a Graves

supporter. (Ptf's 12(M) Resp. P 79.) While Defendants claim that Denson-Williams was a "part-time secretary" whose position was abolished, Plaintiffs correctly note that Defendants' employment records state that her position was "part-time," th same time as Bishop. (Dfts' 12(M) Stmt. P 80; Ptf's 12(M) Resp. P 80.) Dillner, who replaced [*45] Marshall, an African-American supporter of Johnson, is Caucasian and a supporter of Graves. (Ptf's 12(M) Resp. P 84.) Dunn and Torres, who were hired by Graves, are both Graves supporters. (Ptf's 12(M) Resp. P 82.) Defendants, citing only Graves's affidavit, state that McHenry was the secretary for the civil service commission and that that position was abolished; however, not only did Graves admit at his deposition that the knew nothing of McHenry, but the civil service commission had no secretary and, thus, McHenry could not have served in that position. (Ptf's 12(M) Resp. P 85; Dfts' Ex. 50 (L. Thomas Dep.) at 148 (no civil service commission secretary).)

The employees in the Mayor's Office did not take civil service examinations. (Dfts' 12(M) Stmt. P 75.)

4. Water Department

According to Harvey's personnel records, the following persons were employed in the Water Department prior to the Graves administration taking office

Employee	Position	Hiring Date	Race
Wanda Appling	Asst. Manager	09-12-91	B
David Blair	Mgr. Office	03-22-76	W
Joyce Brown	Util. Coord.	11-10-92	B
Dennis Ciecierski	Meter Maint.	12-15-80	W

¹⁴ The parties are in conflict as to which office or department employed Taylor. Defendants' records appear to be in conflict, as well. (*Compare* Ptf's Ex. 9 (Harvey Empl. Rec.) (stating that Taylor was employed by the Mayor's Office) *with* Dfts' Ex. 24 (Taylor Personnel File) (stating that Taylor was employed by the Police Department and then transferred to the Accounting and Finance Department).) Additionally, while Graves states in his affidavit (without showing any personal knowledge) that Taylor resigned, the reason given by Harvey's personnel records for Taylor leaving employment was "Reduction." (Dfts' Ex. 24 (Taylor Personnel File).) The court will consider Taylor as part of the Mayor's Office but notes that the confusion showed here is not atypical in this case.

Employee	Position	Hiring Date	Race
Lanetra Cobb	Office Mgr.	06-19-67	B
Bonnie Corona	Meter Maint.	04-04-89	W
Gilvonne Davis	Revenue Acct.	01-11-93	B
William Davis	Mgr. Field	04-03-78	W
Daphne Finley	Clerk	07-25-94	B
Rufus Fisher	Supt.	11-12-71	B
Errol Foulks	Mechanic	09-06-89	B
Ralph Golba	Pump Rm. Attn.	02-16-66	W
Sherrie Jackson	Pump Rm. Attn.	12-19-83	B
Henry Jefferson	Meter Repair	07-12-89	B
Martin Kalinowski	Meter Maint.	01-28-85	W
Kerry Keelen	Meter Reader	04-20-82	B
James Kemp	Pump Rm. Attn.	07-22-76	W
Sabrina King	Clerk	08-04-93	B
Annette Mitchell	Clerk	09-12-91	B
Richard Pierce	Meter Reader	05-15-86	B
Claude Rials	Clerk	09-12-91	B
Allie Richmond	Clerk	05-11-93	B
Maria Serrato	Clerk	11-14-88	H
John Seidl Sr.	Mechanic	05-09-94	W
Iris Sibby	Clerk (part-time)	04-13-95	B
Jonetta Smith	Clerk	08-08-94	B
William Smith	Welder/Mechanic	09-08-80	W
Lori Vasser	Pump Rm. Attn.	04-01-86	B
Charmaine Northern	Part-time Clerk	02-08-95	B
Monique Thurman	Part-time Clerk	03-06-95	B

[*46] (Ptf's Ex. 4 (Harvey Empl. Rec.)) Prior to the Graves Administration taking office, there were 30 employees, 20 African-Americans (66.7%), 9 Caucasians (30%), and 1 Hispanic (3.3%). By the end of the class period, 7 employees, all African-American, were separated from employment, including Brown (terminated, budgetary letter), Davis (terminated, budgetary letter), Finley (terminated), Fisher (terminated, budgetary letter), Jefferson (terminated, budgetary letter), Rials (terminated during probationary period), and Sibby (resigned). (Dfts' 12(M) Stmt. P 102-08.) As no new employees were hired by the end of the class period, there were 23 employees in the Water Department at the end of the class period, 13 African-Americans (56.5%), 9 Caucasians (39.1%), and 1 Hispanic (4.3%). Since the end of the class period, Harvey has hired 1 full-time employee in the Water Department (Hispanic), hired a total of 13 part-time employees in the Water Department (7 African-American, 6 Caucasian), and had 10 part-time employees (6 African-American, 4 Caucasian) leave employment in the Water Department, leaving a total of 27 employees, 14 African-Americans (51.9%), 11 Caucasians (40.7%), and 2 Hispanics [*47] (7.4%). (Ptf's Ex. 4 (Harvey Empl. Rec.))

Plaintiffs and Defendants again differ on several details. First, Plaintiffs state that Latresa Moore worked in the Water Department, rather than the Finances and Accounting Department. (See L. Moore Decl. P 2.) Second, Plaintiffs allege that Hilda Esperanza (Hispanic, discussed within the Accountings and Finance Department) was initially hired during the class period to work in the Water Department. (L. Moore Decl. P 4.) Third, while L. Moore was allegedly fired for excessive tardiness, she states that others, including Esperanza, were frequently tardy and/or absent, and that all of her (L. Moore's) tardies were excused by Krencjarz-Soria. (L. Moore Decl. PP 4-5.) Fourth, Davis, who allegedly was fired for budgetary reasons, states that she was informed by Graves's administrative assistant, Forte, that she was fired not because of her performance but because "that's politics" (Ptf's 12(N) Stmt. P 159; G. Davis Decl. P 4); Defendants dispute this claim. (Dfts' 12(N) Resp. P 159; Dfts' Ex. 80 (Forte Aff.) P 36.) Fifth, Defendants admit that Fisher's duties were assumed by two Caucasian Water Department employees, Blair and Davis, both [*48] of whom had less seniority than did Fisher. (Dfts' 12(M) Stmt. P 105.)

5. Streets and Sanitation Department

Like Defendants, this court will consider the Streets and Sanitation Department as separate divisions; Plaintiffs allege that the department is not "rigidly" separated into divisions, but the court does not consider that issue to be material.

According to Harvey's personnel records, the following persons were employed as supervisory employees in the Street Departments prior to the Graves administration taking office:

a. Supervisory

Employee	Position	Hiring Date	Race
Loria Cooper-Versher	Administrator	10-07-91	B
Charles Givines	Superintendent	08-17-93	B
James Harper	General Foreman	11-21-83	B
Victoria Jackson	Office Asst.	09-19-94	B

(Pfts' Ex. 4 (Harvey Empl. Rec.)) Prior to the Graves Administration taking office, there were 4 supervisory employees in the Streets Department, all African-American. Cooper-Versher resigned and Givines was terminated, both on April 17, 1995. (Pfts' Ex. 4 (Harvey Empl. Rec.); Dfts' 12(M) Stmt. P 113.) One employee, Judy Seput (Caucasian) was hired as an Office Assistant on August 15, [*49] 1995. Thus, at the end of the class period, there were 3 supervisory employees in the Streets Department, 2 African-Americans (66.7%) and 1 Caucasian (33.3%). Givines' duties were assumed by Harper; both Givines and Cooper-Versher were Johnson supporters, while

Harper was a Graves supporter. (Dfts' 12(M) Stmt. P 113 (stating that Harper assumed Givines's duties); Johnson Decl. P 19 (stating that Cooper-Versher and Givines were active Johnson supporters); Tate Decl. P 4 (stating that Harper was a vocal Graves supporter).)

b. Street Division

According to Harvey's personnel records, the following persons were employed in the Street Division of the Streets Department prior to the Graves administration taking office:

Employee	Position	Hiring Date	Race
Pedro Aguilar	Driver Sweeper	01-25-85	H
Henry Amos	Operator "A"	11-09-87	B
Bryan Boyd	Laborer	08-24-87	B
Robert Brown	Operator "A"	01-31-88	B
James Davis	Driver	09-23-91	B
Dolores Harris	Driver	12-14-93	B
Dexter Haynes	Operator "A"	11-09-87	B
Walter Jones	Laborer	10-26-87	B
Denise Kellogg	Inspector	09-17-91	B
Homer Land	Operator "A"	03-24-69	W
Donald Nesbit	Code Inf. Off.	09-12-94	B
Kenneth Perry	Laborer	05-03-79	W
Clifford Rainey	Operator "B"	09-15-78	B
Richard Seput	Driver	05-05-88	W
Dale Stokes	Laborer	12-09-86	B
Cleophus Thurman	Driver	05-26-87	B
Mitchell Versher	Insp. Demo.	03-07-94	B
Alvin Walsh	Code Inf. Off.	01-17-95	B
Clarence Watts	Driver	03-08-78	B

[*50] (Pfts' Ex. 4 (Harvey Empl. Rec.)) Prior to the Graves Administration taking office, there were 19 employees in the Street Division, 15 African-Americans (78.9%), 3 Caucasians (15.8%), and 1 Hispanic (5.3%). During the class period, 4 employees, all African-Americans, were terminated for budgetary reasons or because their positions were allegedly

abolished: Kellogg, Nesbit, Versher, and Walsh. (Dfts'

12(M) Stmt. PP 116-19.)¹⁵ Because no other employees were hired by the Street Division, these terminations left the Street Division with 15 employees, 11 African-Americans (73.3%), 3 Caucasians (20%), and 1 Hispanic (6.7%). Since the end of the class period, four employees, including 3 African-Americans and 1 Caucasian, have left employment with the Street Division; thus, there are 11 employees in the Division, 8 African-Americans (72.7%), 2 Caucasians (18.2%), and 1 Hispanic (9.1%).

[*51] Plaintiffs allege that Graves supporter and Streets Department employee Mike Lopez told Kellogg that "I

Employee	Position	Hiring Date	Race
Samuel Berry	Part-time	06-01-94	B
William Campbell	Refuse Foreman	05-24-71	W
Stanley Cosby	Laborer	08-15-94	B
Charles Mack	Laborer	07-09-90	B
Harry Marshall	Part-time	09-20-93	B
Robert Sams	Driver	11-07-88	B
John Silas	Driver	04-01-85	B
Arnold Tate	Laborer	04-04-94	B
Daniel Tolbert	Driver	05-19-93	B
Omar Williams	Driver	11-09-93	B
Vince Ellis	Part-time Laborer	06-27-94	B

(Ptfs' Ex. 4 (Harvey Empl. Rec.)) Prior to the Graves Administration taking office, there were 11 employees in the Refuse Division, 10 African Americans (90.9%) and 1 Caucasian (9.1%). Within the class period, only Tate, an African-American who actively supported Johnson, (Tate Decl. PP 1, 3-5), was terminated, allegedly for budgetary [*52] reasons. (Dfts' 12(M) Stmt. P 121; Tate Decl. P 6.) Because the Refuse Division has hired no new employees, at the end of the class period, there were 10 employees in the Refuse Division, 9 African-Americans (90%) and 1 Caucasian (10%). Since the end of the class period, six employees, all African-American, have ceased employment with the Refuse Division; this leaves a total of four employees in the Refuse Division, three African-Americans (75%) and one Caucasian (25%).

Tate states that the Divisions within the Streets Department were not rigid and that laborers worked

better be careful, or I may be found in a ditch soon." (Kellogg Decl. P 4.)

d. Refuse Division

According to Harvey's personnel records, the following persons were employed in the Refuse Division of the Streets Department prior to the Graves administration taking office:

between the different Divisions. (Tate Decl. P 2.) Thus, to the extent that any laborer in any division with less seniority than Tate was kept on the job, Tate's claim would mean that seniority had been violated in terminating Tate. Additionally, Tate alleges that Harper, the General Foreman of the Streets Department and a Graves supporter, harassed Tate and told him that Tate would lose his job if Tate did not cease supporting Johnson and instead support Graves. (Tate Decl. P 4.)¹⁶

[*53] d. Sewer Division

According to Harvey's personnel records, the following persons were employed in the Sewer Division of the Streets Department prior to the Graves administration taking office:

¹⁵ Plaintiffs dispute certain of the facts in Dfts' 12(M) Stmt. PP 116-119. Some of these facts, such as the specific date on which a given employee was hired or was fired. These disputes are not material, as there is no dispute regarding either seniority or whether the Plaintiffs were terminated in the class period. Other of these facts, such as challenges as to whether a given position was abolished, are based on mere speculation by Johnson, who has no personal knowledge to state that the position is currently being filled by another person.

¹⁶ Tate also alleges that his union steward, Darryl Hall, warned him that he would lose his job if he did not support Graves. (Tate Decl. PP 3, 7.) However, there are no allegations that Hall was a Graves supporter or otherwise affiliated with Graves.

1998 U.S. Dist. LEXIS 14937, *54

Employee	Position	Hiring Date	Race
Enoch Boone	Foreman	10-30-78	B
Eric Dawkins	Laborer	07-17-76	B
Willie H. Jones	Laborer	10-17-86	B
William McClelland	Operator "B"	01-19-87	B
Theodore Prazes	Operator "B"	05-26-87	B
Donald Randall	Laborer	04-30-84	B
Frank R. Vance	Laborer	10-01-84	B

(Ptf's' Ex. 4 (Harvey Empl. Rec.)) Prior to the Graves Administration taking office and throughout the class period, there were 7 employees in the Sewer Division, all of whom were African-American. After the class period closed, two employees have left the Sewer Division, leaving five employees, all of whom are African-American. (Ptf's' Ex. 4 (Harvey Empl. Rec.))

e. Mechanic Division

According to Harvey's personnel records, the following persons were employed in the Mechanic Division of the Streets Department prior to the Graves administration taking office

Employee	Position	Hiring Date	Race
Allen Campbell	Laborer	07-09-93	B
Ronald Drewinski	Mechanic "A"	06-11-79	W
Darrell Hall	Mechanic "A"	05-05-86	B
John Seidl, Jr.	Mechanic "A"	05-09-94	W
Anthony Smith	Tf. Rm. Mgr.	01-14-94	B
Melbie Webb	Laborer	06-20-94	B

[*54] (Ptf's' Ex. 4 (Harvey Empl. Rec.)) Prior to the Graves Administration taking office, there were 6 employees in the Mechanic Division, 4 African-Americans (66.7%) and 2 Caucasians (33.3%). No employees were terminated during the class period, while one, Russ Knaack (Caucasian), was hired to be the foreman of the Mechanic Division, (Ptf's' Ex. 4 (Harvey Empl. Rec.)); thus, at the end of the class period there were 7 employees in the Mechanic Division, 4 African Americans (57.1%) and 3 Caucasians (42.9%). After the class period ended, two African-Americans left their employment in the Mechanic Division, leaving a total of 5 employees, 2 African-Americans (40%) and 3 Caucasians (60%).

Plaintiffs note that the position of Foreman that was given to Knaack was not offered to any of the persons who were terminated in the Streets Department, including Foreman James Dixon, who was terminated from the Public Property division allegedly for budgetary reasons.

f. Public Property Division

According to Harvey's personnel records, the following persons were employed in the Public Property Division of the Streets Department prior to the Graves administration taking office:

Employee	Position	Hiring Date	Race
James Dixon	Foreman	10-01-84	B
Steve Josephson	Electrical Tech.	01-21-81	W
Michael R. Lopez	Electrical Tech.	09-11-78	H

[*55] (Ptf's' Ex. 4 (Harvey Empl. Rec.)) Prior to the Graves Administration taking office, there were 3 employees in the Public Property Division, 1 African-American (33.3%), 1 Caucasian (33.3%), and 1 Hispanic (33.3%). During the class period, Dixon was terminated with a budgetary letter, leaving 2 employees, 1 Caucasian (50%) and 1 Hispanic (50%). There have been no other changes to the employment in the Public Property Division.

The parties dispute over whether Josephson was given Dixon's former position, (J. Dixon Decl. P 4), or, instead, whether Josephson assumed some of Dixon's duties while maintaining the same position. (Dfts' Ex. 80 (Forte Aff.) P 13.) The parties also dispute about what Forte, when giving Dixon his termination letter, said to Dixon. Dixon alleges that Forte stated that he "hated to give [Dixon] the letter because he did not believe [Dixon] was 'part of any team,' but that 'he had to do it.'" (J. Dixon Decl. P 3.) Forte alleges that he told Dixon, "that

I hated to let him go but the City had no choice given the budget crisis it was facing at the time." (Dfts' Ex. 80 (Forte Aff.) P 13.)

According to Harvey's [*56] personnel records, the following persons were employed in the Public Property Custodial Division prior to the Graves administration taking office:

g. Public Property Custodial Division

Employee	Position	Hiring Date	Race
Roderick Binion	Street Dept	04-09-90	B
Raphael Gonzales	City Hall	04-01-94	H
Liz Harper	Police Dept.	04-23-91	B
James Howze	Police Dept. -- PT	11-10-93	B
Kevin Lindley	Street Dept.	03-11-93	B
Pedro Lopez	Street Dept.	04-23-90	H
Joseph Perkins	Police Dept.	06-10-91	B
Joseph Roseborough	Police Dept. -- PT	03-17-95	B

(Pfts' Ex. 4 (Harvey Empl. Rec.)) Prior to the Graves Administration taking office, there were 8 employees in the Public Property Custodial Division, 6 African-Americans (75%) and 2 Hispanics (25%). During the class period, Lindley (African-American) was terminated with a budgetary letter, and Lopez resigned, leaving 6 employees, 5 African-American (83.3%) and 1 Hispanic (16.7%). After the class period, 2 African-Americans were hired, one of whom has since left the Division, leaving 7 employees, 6 African-Americans (85.7%) and 1 Hispanic (14.3%).

African-Americans (76%), 9 Caucasians (18%), and 3 Hispanics (6%). There were 6 employees either labeled supervisory or holding the position of foreman, including 3 African-Americans (50%) and 3 Caucasians (50%).

Subsequent to the class period: There are a total of 36 employees in the Streets Department, including 25 African-Americans (69.4%), 8 Caucasians (22.2%), and 3 Hispanics (8.3%). There were 6 employees either labeled supervisory or holding the position of foreman, including 3 African-Americans (50%) and 3 Caucasians (50%).

h. Overall numbers

Before the Graves Administration took office: There [*57] were a total of 58 employees in the Streets Department, including 47 African-Americans (81.0%), 7 Caucasians (12.1%), and 4 Hispanics (6.9%). There were 7 employees either labeled supervisory or holding the position of foreman, including 6 African Americans (85.7%) and 1 Caucasian (14.3%).

6. Police Department

According to Harvey personnel records, there were 84 persons employed by the Police Department prior to the Graves Administration taking office, including 61 African-Americans (72.6%), 17 Caucasians (20.2%), 5 Hispanics (6.0%), [*58] and 1 unidentified (1.2%). (Pfts' Ex. 4 (Harvey Empl. Rec.)) During the class period, the following 29 persons were terminated, resigned, or were suspended from the police department:

At the end of the class period: There were a total of 50 employees in the Streets Department, including 38

Employee	Position	Hiring Date	Separation date	How?	Race
Darwin Adams	Patrol Officer	09-26-94	05-01-95		Un
Rick Anthony	Patrol Officer	08-07-95 *	06-09-95	resig.	B
Ronald Ayers	Pub. Rel. Dir.	08-22-94	04-17-95	term.	B
Ezella Barner	O.P.S. Sec'y	01-18-94	06-01-95	term.	B
Myrtha Barner	O.P.S. Insp.	04-11-88	07-19-95	resig.	B
George Brewton	Relations	12-06-93	04-17-95	term.	B
Loma Broughton	Clerk	02-06-95	07-27-95	term.	B
Ron Burge	Chief	10-11-82	04-10-95	retired	B
Levester Dean	Patrol Officer	09-12-94	05-01-95	resig.	B
Denard Eaves	Sergeant	07-28-80	05-15-95	susp.	B
William Gain	Patrol Officer	09-19-89	07-28-95		W
Michael Galdikas	Patrol Officer	05-27-87	08-01-95		W
Lee Gray	Traffic Superv.	01-16-78	07-01-95	retired	B
Roderick Haynes	Clerk	02-28-92	04-18-95	resig.	B

1998 U.S. Dist. LEXIS 14937, *59

Employee	Position	Hiring Date	Separation date	How?	Race
Bettie Jackson	Dispatcher/911	05-23-94	09-29-95	resig.	B
Diashka Jackson	Clerk/Records	08-18-94	10-01-95		B
Sylvester Jones	Deputy Chief	12-01-92	04-17-95	quit	B
Jerald Lewis	Patrol Officer	09-02-94	08-25-95	term.	B
Joseph Linkus	Inspector	05-04-70	04-17-95	retired	W
William Macklin	Patrol Officer	07-01-95 *	07-09-95		B
Edra McDowell	Clerk	02-18-94	07-14-95	resig.	B
Billy Moore	Patrol Officer	09-12-94	¹⁷ 05-01-95	term.	B
Kevin Moore	Patrol Officer	01-10-94	04-24-95	resig.	B
Brian Patterson	Animal Warden	03-04-94	05-05-95	term.	B
Mechelle Reid	Clerk	02-09-95	05-12-95	resig.	B
Willie Robinson	Patrol Officer	09-12-94	08-25-95	term.	B
Philip Santefort	Patrol Officer	05-24-95 *	07-28-95	resig.	B
Erica Smith	Records Clerk	10-12-95 *	10-16-95		B
Joseph Spells	Dispatcher/911	04-11-94	05-01-95	term.	B

[*59]

(Ptf's' Ex. 4 (Harvey Empl. Rec.)) Among the 29 persons separated from Police Department employment were 25 African-Americans (including 4 added during the

class period, marked with an asterisk), 1 unidentified person, and 3 Caucasians. In addition to the 4 persons hired during the class period, 35 employees were hired during the class period:

Employee	Position	Hiring Date	Race
Richard Aldridge	911 Comm.	08-07-95	W
Philip Arnold	Commander	04-24-95	W
Dennis Ballasone	Patrol Officer	06-16-95	W
Marion Beck	Inspector	04-13-95	B
Russell Calahan	Patrol Officer	09-11-95	W
Lorez Davis	Secretary	07-03-95	B
Neal Frundle	Patrol Officer	07-07-95	W
Robert Garett	Deputy	07-12-95	B
Gary Genovese	Training Officer	05-01-95	W
Jessica Ginett	Secretary	10-01-95	I
George Green	Patrol Officer	09-11-95	W
Jeffrey Haddon	Patrol Officer	05-08-95	W
Richard Harang III	Patrol Officer	09-11-95	W
Dean Harrison	Patrol Officer	09-11-95	W
Juanita Hendrick	911 Comm.	11-20-95	H
Roger Jage	Patrol Officer	09-11-95	W
Andrew Jaleniewski	Patrol Officer	06-01-95	W
Joyce Jones	Clerk	05-30-95	B
Blair Keppner	Patrol Officer	10-09-95	W
Eric Keyes	Patrol Officer	09-11-95	B
Lennie Labauex	Part-time	11-27-95	Unident.
George Lockett	Patrol Officer	09-11-95	B
Angela Mack	Part-time Clerk	06-17-95	B
Maria Macon	Clerk	07-24-95	B
William Martin	Detective	07-10-95	B
Matthew Medlan	911 Comm.	07-31-95	W
John Meredith	Patrol Officer	09-06-95	W
David Moake	Patrol Officer	09-11-95	W

¹⁷ Plaintiffs dispute this firing date and instead state that B. Moore was terminated on September 13, 1995. (B. Moore Decl. P 2.) This difference is significant because May 1, 1995, was during B. Moore's probationary period, while September 13, 1995 was after the probationary period was over.

Employee	Position	Hiring Date	Race
Charles Stinson	911 Comm.	05-01-95	B
Joseph Thomas	Patrol Officer	09-14-95	W
Dean Tucker	Patrol Officer	09-11-95	W
Neicyee Walls	Clerk/Matron	08-15-95	B
James Ward	Patrol Officer	08-01-95	W
Samuel White	Patrol Officer	09-11-95	B
James Williams	Patrol Officer	09-12-95	B

[*60] Thus, at the end of the class period there were a total of 94 employees in the Police Department, including 53 African-Americans (56.4%), 33 Caucasians (35.1%), 6 Hispanics (6.4%), and 2 Unidentified or Other (2.1%). After the end of the class period, 57 persons were hired by the Police Department (including 31 African-Americans, 19 Caucasians, and 7 Hispanics) and 42 persons separated from their employment with the Police Department (including 22 African-Americans, 15 Caucasians, and 5 Hispanics), leaving a total of 109 employees in the Police Department, including 62 African-Americans (56.9%), 37 Caucasians (33.9%), 8 Hispanics (7.3%), and 2 Unidentified or Other (1.8%). (Ptfs' Ex. 4 (Harvey Empl. Rec.))

To be hired as a police officer in Harvey, an individual must take a civil service exam or be hired laterally from another police department. (Dfts' 12(M) Stmt. P 133.) A lateral transfer must be in good standing at another police department and have completed any applicable probationary period. (Dfts' 12(M) Stmt. P 133.) The ranks for police officers are patrol officer, sergeant, lieutenant, and captain. (Dfts' 12(M) Stmt. P 134.) Administration positions in the Police Department [*61] include detective, investigator, and watch commander. (Dfts' 12(M) Stmt. P 135.) Other civilian positions in the Police Department include dispatchers, clerks, secretaries, and 911 operators; those civilians do not take civil service examinations. (Dfts' 12(M) Stmt. P 136.) Prior to the Graves Administration taking office, there were a total of 41 officers in the Police Department with the ranks of patrol officer, sergeant, lieutenant, and captain. (Ptfs' Ex.4 (Harvey Empl. Rec.)) At the end of the class period, there were a total of 51 officers in the Police Department with the ranks of patrol officer, sergeant, lieutenant, and captain. (Ptfs' Ex. 4 (Harvey Empl. Rec.)) Subsequent to the end of the class period, the number of officers in the Police Department with the ranks of patrol officer, sergeant, lieutenant, and captain was raised to 60. (Ptfs' Ex.4 (Harvey Empl. Rec.))

Sylvester Jones left his position prior to April 17, 1995; a court subsequently granted Harvey a default judgment

against Jones on the claim that Jones had defrauded Harvey of approximately \$ 143,000. (Dfts' 12(M) Stmt. P 144; Dfts' Ex. 42.) William Macklin, a Graves supporter, resigned on July 9, 1995 during [*62] termination proceedings. (Ptfs' Ex. 10 (Dfts' Resp. to Interr.) P 14(b).) Defendants state that Billy Moore was terminated on May 1, 1995 for failure to perform his duties adequately during the probationary year (which would end for him on September 12, 1995); B. Moore states that he had investigated Graves supporters Macklin and Damiani early in his probationary year and that he was actually terminated on September 13, 1995, after his probationary year, after he took time off to be with his dying father and that any accusations against him are false. (Dfts' 12(M) Stmt. P 148; B. Moore Decl. PPP 1-8.) Defendants note that Kevin Moore resigned on April 24, 1995, but Plaintiffs state that K. Moore was threatened by Defendant Damiani when K. Moore, a Johnson supporter, refused to switch allegiance to Graves and to buy tickets to a Graves fundraiser and that, after Graves's election, K. Moore was harassed by Defendant Barton, who told him that it was in his best interest to resign and who continued to harass him after K. Moore resigned. (Dfts' 12(M) Stmt. P 149; K. Moore Decl. PP 1-10.) Brian Patterson's position as animal warden was abolished on May 5, 1995, (Dfts' 12(M) Stmt. P 150); [*63] Plaintiffs note that Patterson was an active Johnson supporter. (Johnson Decl. P 19.)

4. Overall

Sixty-nine employees were separated from Harvey's employ from April to June of 1995. (Ptfs' 12(N) Stmt. P 27.) Sixty-eight of those employees were African-American, and the only Caucasian on the list, Joseph Linkus, was a Johnson supporter who retired in April 1995. (Ptfs' 12(N) Stmt. P 27.) The parties dispute the number of hirings between April and September of 1995, with Plaintiffs stating that 86 employees were hired (including 40 Caucasians, 3 Hispanic, and 43 African-Americans), (see Ptfs' Ex. 2B), and Defendants stating that there were 95 employees hired (including 54 African-Americans, 38 Caucasians, and 3 Hispanics). (See Freeman Aff. P 17.) Because neither Plaintiffs nor

Defendants cite which specific records support their claim, and because Defendants did not even attach the records that underlie their expert's affidavit, the court cannot determine whether the dispute is genuine or not. As each party is allegedly working from the same set of records (i.e., Harvey's employment records), the simple issue of how many hirings and terminations (voluntary or involuntary) [*64] occurred should be undisputed.

The parties also disagree about the exact amount of money expended on payroll during the relevant period. Plaintiffs state that the first payroll of each relevant month was: \$ 271,990.28 (April, the last Johnson payroll); \$ 259,561.93 (May), \$ 263,505.02 (June), \$ 269,044.15 (July), \$ 271,088.84 (August), and \$ 276,380.95 (September). (Ptf's 12(N) Stmt. P 29 (citing Ptf's Ex. 2E).) Defendants argue that the relevant payrolls were: \$ 276,464.36 (April), \$ 260,394.89 (May), \$ 266,110.82 (June), \$ 269,953.27 (July), \$ 272,549.69 (August), and \$ 288,773.46 (September). (Dfts' 12(N) Resp. P 29 (citing Freeman Aff. P 7).) Again, the parties' failure to identify the particular records upon which these claims are based renders what should be a simple task (determining from payroll records what Harvey's payroll was at given times) into an impossible one. The court is also not certain whether the parties are considering the same time periods, as Plaintiffs refer, e.g., to the first payroll of June, while Defendants refer, e.g., to the payroll from "May 29, through June 6, 1995." (Ptf's 12(N) Stmt. P 29; Dfts' 12(N) Stmt. P 29.) It is undisputed, however, that [*65] the amount of money expended on payroll dropped by over \$ 10,000 from the last Johnson payroll to the first payroll of May and then steadily increased through September such that by the first September payroll, the Graves government was expending more money in payroll (\$ 5000 more according to Plaintiffs, \$ 12,000 more according to Defendants), than did Johnson in his last payroll.

Overall, in April, prior to Graves taking office, there were 338 Harvey employees, including 241 African-Americans (71%). By October of 1995, after the class period closed, there were 324 Harvey employees, including 193 African-Americans (60%). (Ptf's Ex. 2.)

Plaintiffs allege that Defendants' acts and their impact on African-Americans and Johnson supporters in the work force were well-known. (Ptf's 12(N) Stmt. P 240.) Aldermen Kellogg and Arrington stated that the replacement of African-Americans with Caucasians was noticeable and that both Kellogg and Arrington spoke out about the acts, but the City Council Defendants did nothing. (Ptf's 12(N) Stmt. P 240.)

C. Civil Service Commission

Julian Patterson was sworn in as a Civil Service Commissioner by Johnson in 1991; he filled a vacancy in [*66] a term to expire in 1993. (Dfts' 12(M) Stmt. P 155.) Jack Spells was also sworn in as Commissioner in 1991. (Dfts' 12(M) Stmt. P 155.) Linia Thomas became a Commission on November 4, 1994, taking the place that had been filled by Ernest Whootten. (Dfts' 12(M) Stmt. P 156.) The parties dispute whether Johnson reappointed Patterson. (*Compare* Dfts' Ex. 43 (Patterson Dep.) at 26 (stating that Patterson did not recalled being reappointed or receiving any documentation or being told that he had been reappointed) *with* Johnson Decl. P 23 (stating that Johnson believed that he reappointed Patterson in 1994 to another three-year term).) Patterson remained on the Civil Service Commission until 1995. (Dfts' Ex. 43 (Patterson Dep.) at 26.) Spells served on the Civil Service Commission until 1993 and was subsequently replaced by Fred Wright. (Dfts' 12(M) Stmt. PP 159-60.) By March 30, 1995, the Civil Service Commission consisted of Patterson, Thomas, and Dr. Justin Akugieza, but Akugieza left the Commission prior to the April 4, 1995 mayoral election. (Dfts' Ex. 4 (Johnson Dep.) at 42-47.) Johnson did not have the opportunity to appoint someone to replace Akugieza on the Civil Service Commission [*67] prior to the election. (Dfts' Ex. 4 (Johnson Dep.) at 47.)

The parties dispute several details about the transition period after the mayoral election of April 4, 1995. After the election, Patterson never contacted Graves to inquire into his role on the Civil Service Commission. (Dfts' 12(M) Stmt. P 163.) However, while Defendants have produced two letters, one dated April 17, 1995, and one dated April 24, 1995, addressed to Patterson and to Thomas requesting that Patterson and Thomas contact either Graves or Barton about pending civil service cases, (*see* Dfts' Ex. 45 & 46), both Patterson and Thomas state that they received no correspondence from the Graves' administration pertaining to their appointments. (*See* Dfts' Ex. 43 (Patterson Dep.) at 41 and 66 (stating that Patterson received no correspondence from the Graves administration regarding his appointment and that Patterson specifically did not receive the April 17, 1995 letter allegedly sent to him); Dfts' Ex. 44 (Thomas Dep.) at 148 ("I had no literature on this April the 13th. After the

election, I don't know nothing, so . . .").¹⁸ Defendants also produced a letter dated May 1, 1995 and addressed to Thomas stating [*68] that Graves assumed that Thomas was resigning; Plaintiffs again dispute the claim that this letter was sent to Thomas because Thomas received no correspondence from Graves. (Dfts' 12(M) Stmt. P 166; Pfts' 12(M) Resp. P 166.)

On or around the time that Graves took office (April 13, 1995), several [*69] cases were pending before the Civil Service Commission, including charges against Defendants Barton and Damiani, as well as Macklin,

Name	Race	Outcome
Myrtha Barner	B	Resigned before hearing completed
Denard Eaves	B	Hearing suspended pending this case
Archie Stallworth	B	Employment terminated; appealed decision and lost appeal
John Llewellyn	W	Resigned before hearing completed
Aaron Taylor	B	Resigned before hearing completed
Dan Rodriguez	H	Resigned before hearing completed
William Macklin	B	Resigned before hearing completed
Bettie Jackson	B	Resigned before hearing completed

(Dfts' 12(M) Stmt. [*70] P 170.)¹⁹ A matter pending before the Civil Service Commission as of March 30, 1995 was a motion to reconsider Robert Wright's termination for violation of the city residency requirement. (Dfts' 12(M) Stmt. P 173.)²⁰

On May 8, 1995, Graves appointed Darren White, Robert [*71] McDade, and Sylvester Williams as Civil Service Commissioners. (Dfts' 12(M) Stmt. P 174.) McDade was elected as Chairman of the new Commission by his fellow Commissioners. (Pfts' 12(N) Stmt. P 304.) McDade was active in Graves's campaign and was working for the Harvey Police Department Office of Professional Standards at the time of his appointment. (Pfts' 12(N) Stmt. P 304.) Williams also

Vincent Rizzi, John Rizzi, and Edison Torres. (Dfts' Ex. 43 (Patterson Dep.) at 69-71.) Graves rescinded the suspensions against Barton, Damiani, and Macklin on April 13, 1995, the night that Graves took office. (Dfts' Ex. 74 (Graves Dep.) at 107-08.) Graves also knew that by April 18, 1995, Barton had rescinded the charges against Barton, Damiani, V. Rizzi, J. Rizzi, and Torres. (Dfts' Ex. 74 (Graves Dep.) at 141-42.) From April 4, 1995, to August 1997, the following employees requested and received Civil Service Commission hearings:

supported Graves in the 1995 election and made his support public known, including attending more than one Graves function. (Pfts' 12(N) Stmt. P 304; Williams Dep. at 11-15.) White also supported Graves during the election and performed campaign work for Graves, including stuffing letters, handing out literature, displaying a sign in front of his home, wearing a button, answering telephones at Graves's campaign headquarters, and bringing food to Graves's poll watchers on election day. (Pfts' 12(N) Stmt. P 305.) White testified that Graves and Barton spoke with him and told him "that they found it necessary to replace the members of the civil service commission and asked me would I be interested in serving as one of the commissioners" and "that the whole civil service

¹⁸ Defendants dispute the claim that Patterson and Thomas never got the letters, though they produce no evidence or testimony to state that they did get the letters. Defendants cite to deposition testimony from Graves to state that his secretary mailed the letters and placed them in the Civil Service Commission's box. (Dfts' 12(N) Resp. P 302.) However, the testimony makes clear that Graves *assumed* that his secretary sent Patterson and Thomas the letters "by mail and I believe in their box. . . .", but that Graves "can't honestly say yes that she [Graves's secretary Hope Webster] sent every one of them out. It might have been the other lady. . . . So I don't know what --". (Dfts' Ex. 74 (Graves Dep.) at 144-45.)

¹⁹ Defendants' 12(M) Stmt. P 171 states: "No other Harvey employees or former employees have requested a hearing before the Civil Service Commission during this time period." The cite given, Dfts' Ex. 50 (Dfts' Resp. to Interr.) P 13, does not support this claim, as interrogatory 13 does not ask who had requested a hearing but only for "every disciplinary matter that has been referred to the Harvey Civil Service Commission since April 13, 1995."

²⁰ Defendants also claim that two other employees, Ricky Graves and Michael Landini, had cases pending before the Civil Service Commission at the time that Graves took office. (Dfts' 12(M) Stmt. P 173.) However, the materials to which Defendants cite, Dfts' Ex. 52, do not support this claim.

commission was being replaced." [*72] (White Dep. at 15.) The newly constituted Civil Service Commission did not hold any hearings until May 27, 1995. (Ptf's 12(N) Stmt. P 306.)

Graves believes he may have discussed his plans to replace the Civil Service Commission with his own appointees with those he ultimately did appoint as Commissioners. (Ptf's 12(N) Stmt. P 298.) During the election, William Alderson, Graves's campaign manager, spoke with one of the persons ultimately appointed by Graves and asked him if he would serve as a commissioner if Graves won the election. (Ptf's 12(N) Stmt. P 298.) Graves also admits that he changed the lock on the outer door to City Hall, which the Commissioners would have to use to enter City Hall, within a week of his taking office and that he changed the key to the Council Chambers, through which the Commissioners had to pass to get to their office, within a "week or two or three" of his taking office. (Dfts' Ex. 74 (Graves Dep.) at 113-16.)²¹ Thomas states that Graves announced as the first city council meeting after his taking office that he was appointing a new Civil Service Commission. (Dfts' Ex. 40 (Thomas Dep.) at 89-90.) Graves testified that he doesn't remember making that [*73] announcement. (Dfts' Ex. 74 (Graves Dep.) at 160.) Thomas states that she understood from that city council meeting that she was no longer a Commissioner. (Ptf's 12(N) Stmt. P 303.) Thomas wanted to finish her term, but stated that she "didn't have the money to fight City Hall." (Ptf's 12(N) Stmt. P 303.)

Among the actions taken by the Civil Service Commission after Graves appointed the new members were a number of actions involving Graves supporters. Prior to the election, a number of disciplinary actions involving Graves supporters, including Damiani, Vince Rizzi, Barton, and Macklin, were pending before [*74] the Civil Service Commission. (Ptf's 12(N) Stmt. P 308.) On the night that Graves was sworn in, Barton drafted the letter to the Civil Service Commission rescinding the charges against himself and other Graves supporters. (Ptf's 12(N) Stmt. P 308.) The Civil Service Commission then voted to rescind the charges as requested in that letter. (Ptf's 12(N) Stmt. P 308.) Prior to the election, the Civil Service Commission had voted to dismiss Robert Wright, a Graves supporter. (Dfts' 12(N) Resp. P 309;

Ptf's 12(N) Stmt. P 309.) In June of 1995, the newly constituted Civil Service Commission rescinded the charges and reinstated Wright. (Ptf's 12(N) Stmt. P 309.) Wright was not aware of any new evidence offered to the Civil Service Commission between the time that he was dismissed and the time that he was reinstated. (Ptf's 12(N) Stmt. P 309; Wright Dep. at 8.) Other matters pending before the Civil Service Commission included charges against Michael Landini and Ricky Graves, Mayor Graves's son. (Ptf's 12(N) Stmt. P 310.) Ricky Graves was terminated in 1993; his motions for reconsideration in 1993 and 1994 were not granted by the then-sitting, Civil Service Commission. (Ptf's 12(N) Stmt. P [*75] 310; Dfts' 12(N) Resp. P 310.) The newly constituted Civil Service Commission granted reconsideration for Ricky Graves without a formal hearing. (Ptf's 12(N) Stmt. P 310; White Dep. at 24.) White admits that he did not know whether Ricky Graves had timely filed his request for reconsideration and did not ask any questions on that issue. (White Dep. at 29.) Regarding Landini, while it is undisputed that he was terminated prior to the April 1995 election, the parties dispute the reason why he was terminated and whether the Civil Service Commission rescinded his termination. (Ptf's 12(N) Stmt. P 310; Dfts' 12(N) Stmt. P 310.) By May of 1995, Landini had returned to the City's employ. (Landini Dep. at 58.) Landini supported Graves in the election. (Ptf's 12(N) Stmt. P 310.) Williams admits that the Civil Service Commission under Graves did not hold hearings on rescinding actions taken against Graves supporters. (Ptf's 12(N) Stmt. P 311.) Williams states that he did not read papers or ask questions regarding whether a decision of the previous Civil Service Commission should be reversed but instead followed what the police chief or the city lawyer requested. (Ptf's 12(N) Stmt. P 311.)

[*76] C. Facts regarding Plaintiffs

1. Ezella Barner

Ezella Barner was hired by Harvey on January 18, 1994. (Dfts' 12(M) Stmt. P 194.) E. Barner's daughter is Myrtha Barner, the former supervisor of the Police Department's Office of Professional Standards ("OPS"). (Dfts' 12(M) Stmt. P 194.) E. Barner worked as a secretary in the OPS; as part of her job, she dealt with

²¹ Plaintiffs also allege that a security guard threatened Commissioner Thomas when she "attempted to go to the Civil Service Commission offices after Graves took office." (Ptf's 12(N) Stmt. P 300.) However, the cited support does not say that the event took place after Graves took office, but merely that it happened after March 31 and before the first Council meeting. (Dfts' Ex. 44 (Thomas Dep.) at 150.)

"extremely confidential" information. (Dfts' 12(M) Stmt. P 195; Dfts' Ex. 60 (E. Barner Dep.) at 60.) E. Barner never took a civil service examination before becoming the OPS secretary. (Dfts' 12(M) Stmt. P 195.) E. Barner's job duties included scheduling appointments and court dates, performing routine office duties, assigning community service workers to areas of service, and taking applications and interviewing police cadets. (Dfts' 12(M) Stmt. P 196.) E. Barner also typed the listings for the urinalysis and did other duties as assigned. (Dfts' Ex. 60 (E. Barner Dep.) at 29.) OPS conducted employee drug testing for officers, investigated any discharge of a firearm by an officer, and completed liquor license background investigations. (Dfts' 12(M) Stmt. P 197.)

On April 17, 1995, E. Barner was reassigned -- [*77] Defendants state that the reassignment was to the Service Bureau, while Plaintiffs state that the reassignment was to being a records clerk. (Pfts' 12(N) Stmt. P 39; Dfts' 12(N) Resp. P 39.) On April 19, 1995, E. Barner received a letter from Barton (then the interim police chief) stating that E. Barner had subsequently violated departmental rules. (Dfts' 12(M) Stmt. P 198; Dfts' Ex. 60 (E. Barner Dep.) at Dep. Ex. 3.) That letter states that E. Barner failed to report to work as ordered by Barton and that E. Barner was suspended for three days without pay. (Dfts' Ex. 60 (E. Barner Dep.) at Dep. Ex. 3.) Also on April 19, 1995, Barton wrote E. Barner a letter stating that she was suspended without pay for five days for spending the entire day in the cafeteria. (Dfts' Ex. 60 (E. Barner Dep.) at Dep. Ex.4.) On May 2, 1995, E. Barner allegedly approached Barton, asked him why he fired her daughter, and told him that he "would pay for this shit" and used other profanity; E. Barner was suspended for ten days without pay. (Dfts' Ex. 60 (E. Barner Dep.) at Dep. Ex. 5.) E. Barner disputes the claim that she failed to report to work or that she violated Barton's orders by remaining in the cafeteria. [*78] She states that she is a paraplegic who is confined to a wheelchair and that on April 17, 1995, Barton assigned her to work in the cafeteria because "he didn't want me working in any of his departments" and that at the end of the week Barton would fire her for incompetence. (Dfts' Ex. 60 (E. Barner Dep.) at 70-73.) E. Barner also states that she informed Barton that she was going home because "I was a worker, and I was not going to roll around in the hall" and that Barton told her to go home. (Dfts' Ex. 60 (E. Barner Dep.) at 72-73.) E. Barner states that she reported to work on April 18, 1995 and on April 19, 1995 in the cafeteria; E. Barner left on April 19, 1995, after Damiani gave her a package,

including Barton's letter, and told her to leave the station immediately. (Dfts' Ex. 60 (E. Barner Dep.) at 74-75.) E. Barner also denies using any profanity toward Barton on May 2, 1995, and states that she did not even know that her daughter had been fired at the time that she allegedly cursed at Barton. (Dfts' Ex. 60 (E. Barner Dep.) at 80-81.)

Defendants allege that E. Barner committed gross insubordination on May 30, 1995, causing Barton to terminate her on June 1, 1995. (Dfts' 12(M) [*79] Stmt. P 202.) Defendants state that Barton ordered E. Barner to comply with an internal departmental investigation and that E. Barner replied that she was tired of Barton and the others "messaging with [E.Barner] and [her] daughter. I'm not going to cooperate with Camille [Damiani], you [Barton], the Harvey Police Department or anybody in this Department today, in the future or forever!" (Dfts' 12(M) Stmt. P 202; Dfts' Ex. 60 (E. Barner Dep.) Dep. Ex. 6.) Defendants state E. Barner was advised that failure to cooperate would cause her to be subject to disciplinary action and that E. Barner replied, "Do whatever you have to do. I don't plan to cooperate with anybody here." (Dfts' 12(M) Stmt. P 202; Dfts' Ex. 60 (E. Barner Dep.) Dep. Ex. 6.) E. Barner disputes this claim, stating that E. Barner was called into Damiani's office and told that drugs had been found in her workspace and that Damiani ordered to her answer questions despite E. Barner requesting an attorney. (Pfts' Ex. 35 (E. Barner tape of 5/31/95 conversation.) Plaintiffs include a transcript of a tape of the conversation on May 31, 1995 between Damiani and E. Barner; in the conversation, there is no mention of E. Barner [*80] using profanity toward anybody, and E. Barner states several times that she wants counsel. (Pfts' Ex. 35.) E. Barner also states that she did not know why she had been called in for questioning, to which Damiani states "Okay. You're here because -- [E. Barner interrupts] -- we found three grams of cocaine in the Office of Professional Standards in a file cabinet." (Pfts' Ex. 35.)

E. Barner was terminated by Barton. (Dfts' 12(M) Stmt. P 204.) E. Barner admitted that she never filed a response to Dep. Ex. 3-6, the letters by which Barton accused her of wrongdoing. (Dfts' 12(M) Stmt. P 203.) E. Barner states that she did attempt to get a Civil Service Commission hearing regarding her termination but that she had been told that there was no Civil Service Commission in place. (Dfts' Ex. 60 (E. Barner Dep.) at 64-67.) E. Barner supported Johnson by voting for him and by talking to her neighbors about him. (Dfts'

12(M) Stmt. P 205.) E. Barner also states that Barton asked her to purchase tickets to a Graves fundraiser prior to the April 4, 1995 election and that she declined, telling Barton that she supported Johnson. (Ptfs' 12(M) Resp. P 205; Barner Decl. P 3.) Barton denies that the [*81] conversation with E. Barner about supporting Johnson occurred. (Dfts' 12(N) Resp. P 38; Barton Aff. P 11.)

It is undisputed that E. Barner's positions as a secretary and as a records clerk were covered by the AFSCME contract. (Ptfs' 12(N) Stmt. P 40.) Also, on March 31, 1995, E. Barner was officially granted the permanent rank of secretary by the Civil Service Commission retroactive to January 18, 1994. (Barner Aff, Ex. 1 (3/31/95 Civil Service Comm. Order).)

2. Myrtha Barner

M. Barner was hired by the Harvey Police Department on April 11, 1988. (Dfts' 12(M) Stmt. P 232.) On December 16, 1991, she was promoted to detective. (Dfts' 12(M) Stmt. P 232.) On February 8, 1993, she was appointed to the position of Inspector and assigned to the Office of Professional Standards. (Dfts' 12(M) Stmt. P 232.)²² M. Barner was granted the permanent rank of sergeant by the Civil Service Commission on March 31, 1995, retroactive to February 5, 1993. (Ptfs' Ex. 6.) The day Graves took office, Damiani was reassigned from the OPS to the Patrol Division under Barton's orders. (Ptfs' 12(N) Stmt. P 55.) M. Barner knew that Damiani was a Graves supporter. (Ptfs' 12(N) Stmt. P 55.)

[*82] In April and May of 1995, several disciplinary charges were brought against M. Barner. (Dfts' 12(M) Stmt. P 235.) M. Barner disputes the bases of the charges and states that several of the alleged incidents occurred years before the charges were made and occurred when neither Damiani nor Barton were working for the Harvey Police Department. (Ptfs' 12(N) Stmt. P 57.) Barton and Damiani, however, dispute the claim that the incidents were false or that any of the incidents occurred when Damiani and Barton were not working for the Harvey Police Department. (Dfts' 12(N) Resp. P 57.) One charge alleged that a missing portable Allertz computer, which was assigned to the Patrol Bureau, was found in the drawer of the OPS laboratory. (Dfts'

12(M) Stmt. P 236.) Another charge stated that a screen for sifting cocaine, three grams of cocaine, and a portable scale were found in the OPS file cabinet; this charge also stated that M. Barner had admitted to allowing unauthorized persons to have access to her division. (Dfts' 12(M) Stmt. P 237.) M. Barner states that these claims were false. (M. Barner Decl. P 6.) Another charge noted that, since December of 1994, M. Barner had not logged any of the [*83] required information relating to incoming calls through the Records Division, to the radio room, and to band 1 and band 2 transmissions. (Dfts' 12(M) Stmt. P 238.) A further charge claimed that M. Barner had not videotaped the booking area (as required) since March 8, 1995, even though the cameras were in working order. (Dfts' 12(M) Stmt. P 239.) Another charge stated that M. Barner had failed to keep any records of the daily, weekly, or monthly maintenance of the ADX drug testing machine since her assignment to the OPS, that the machine was not kept in good condition, and that the controls and calibrators had expired in October 1994, risking false readings. (Dfts' 12(M) Stmt. P 240.) Pursuant to these charges, M. Barner was suspended from duty without pay pending termination. (Dfts' 12(M) Stmt. P 241.) M. Barner states that she was given only one day's notice of the investigation; the day after being given notice, May 2, 1995, M. Barner was suspended without pay. (Ptfs' 12(N) Stmt. P 58.) M. Barner also states that she did not receive written charges, that Damiani told her to sign a paper stating that she had received written charges, but that Damiani refused. (Ptfs' 12(N) Stmt. P [*84] 59.) Damiani disputes the claim that M. Barner did not receive written charges. (Dfts' 12(N) Resp. P 59.)

Within approximately one week of her suspension, M. Barner called City Hall to ask when the Civil Service Commission would meet because she wanted a hearing. (Ptfs' 12(N) Stmt. P 60.) M. Barner states that the woman who answered the phone "Mayor's office," would not tell M. Barner her name, would not allow M. Barner to speak to the Mayor, and gave M. Barner little information except to say that the Civil Service Commission had not been appointed and to check the newspaper for an announcement. (Ptfs' 12(N) Stmt. P

²² Defendants cite to a portion of Defendant Damiani's deposition to support claims of what the duties of Inspector of OPS are, but the cited material deals with *Damiani's* duties as Commander of OPS. (Dfts' 12(M) Stmt. P 233; Dfts' Ex. 41 (Damiani Dep.) at 233.)

60.)²³ M. Barner was served with written charges on May 24, 1995. (Ptf's 12(N) Stmt. P 61; Dfts' 12(N) Resp. P 61.) M. Barner appeared before the Civil Service Commission regarding these charges, but resigned on July 19, 1995, before termination hearings could be concluded. (Dfts' 12(M) Stmt. P 242.) M. Barner states that she attended two civil service hearings but decided not to continue with the proceedings because she believed them to be a sham; she states that the commissioners were new Graves appointees, the hearings included off-the-record conferences in the back [*85] room between the commissioners and Barton, and M. Barner witnessed the commissioners laughing at her and her attorney. (Ptf's 12(N) Stmt. P 62.) Defendants dispute the claims that Barton and the commissioners engaged in off-the-record conferences in the back room of the commissioners laughed at M. Barner and her attorney. (Dfts' 12(N) Resp. P 62.) M. Barner states that she resigned because her paychecks were withheld, contrary to the Civil Service Commission's orders, pending her resignation for over 30 days and that she could not financially wait for the end of the hearings. (Ptf's 12(N) Stmt. P 63.) M. Barner resigned in front of the Civil Service Commission and received her paychecks; M. Barner made clear that by resigning and accepting the checks she was not excluding herself from the federal lawsuit at issue in this case. (Ptf's 12(N) Stmt. P 64; White Dep. at 95-100.)

[*86] M. Barner states that she was harassed by Graves supporters before and after she resigned, including while she was working for her new employer, the Phoenix Police Department. (Ptf's 12(N) Stmt. P 65.) Included among her alleged harassments were: times when Graves supporters would follow her from her home; being falsely ticketed for failing to stop at a non-existent white line; and having Harvey employees broadcast her home address and call her a crack-head and dope head over the police radio station after she had resigned and was working for the Phoenix Police Department. (Ptf's 12(N) Stmt. P 65.) Bettie Jackson has also testified that she heard Barton announce over

the intercom in the training room that the Harvey Police Department were not to assist A. Barner or Clark in their capacities as Phoenix police officers if M. Barner or Clark sent out calls needing back-up or any assistance. (Ptf's 12(N) Stmt. P 66.) Barton denies all of these allegations of harassment. (Dfts' 12(N) Resp. PP 65-66.)

M. Barner is African-American and supported Johnson in the 1995 election by including Johnson posters in her windows on a heavily traveled street in Harvey, distributing literature, and talking [*87] to neighbors. (M. Barner Decl. P 2.)

3. Joyce V. Brown

Brown worked as a clerk in the Water Department from November 1992 through March 1993. (Ptf's 12(N) Stmt. P 67.) From March 1993 to October 1993 she worked as an administrative aide, and from October 1993 until October 1994, she worked as an administrative aide and health inspector for the Planning Department. (Ptf's 12(N) Stmt. P 67.) As of October 7, 1994, Brown was Utilities Coordinator in the Water Department. (Dfts' 12(M) Stmt. P 253.) Brown did not take a civil service examination. (Dfts' 12(M) Stmt. P 253.) Brown states that her position involved some use of "judgment, discretion, expertise" and that she coordinated all activities of the water department which involved "Ameritech and payments, collections of the water department" including the collection of payments, reconciliation of accounts and cash flow, training new staff, and the scheduling of staff. (Dfts' Ex. 67 (Brown Dep.) at 25-29.) Brown was paid \$ 21,000 a year as Utilities coordinator and states that her job position was lower than all but two positions in the Water Department. (Ptf's 12(N) Stmt. P 68.) Brown's position was supervisory and managerial. [*88] (Dfts' 12(M) Stmt. P 254.)²⁴

Brown was terminated on April 28, 1995 and did not request a civil service hearing to protest her termination. (Dfts' 12(M) Stmt. P 255.) Brown testified that two

²³ Defendants challenge the admissibility of this statement, first, on the grounds that it is based on inadmissible hearsay, and, second, on the grounds that the cited support is M. Barner's declaration. As previously noted, the second grounds fails where the affiant, here, M. Barner, has personal knowledge of the events to which she is attesting. The first grounds also fails because the woman who answered the phone is arguably an employee of Graves with authorization to speak for Graves, as she allegedly did answer the phone in the Mayor's Office with the words "Mayor's Office."

²⁴ Defendants also claim that Brown admitted that she was responsible for the implementation of policy. (Dfts' 12(M) Stmt. P 254.) The cited support, however, was a question which asked whether she was responsible for the implementation of policy or of procedures, to which she answered "yes" without specifying whether she implemented policy or procedures. (Dfts' Ex. 67 (Brown Dep.) at 29.)

persons whom she trained and who started working for Harvey after she did were retained while she was fired. (Ptfs' 12(N) Stmt. P 74.)²⁵ Brown did not actively work in Johnson's 1995 campaign because she was running for her own election for a seat on the Park District Board. (Dfts' 12(M) Stmt. P 256.) Brown was active in Johnson's two elections prior to the 1995 election, including handing out and mailing campaign litigation. (Dfts' [*89] Ex. 67 (Brown Dep.) at 7-9.) Brown did display a Johnson poster in her window during the 1995 election but does not know whether Defendants saw the poster, though she did state that Graves election workers walked up and down her street. (Dfts' Ex. 67 (Brown Dep.) at 48.) Brown stated that she had no evidence regarding whether Hardiman, Barton, Damiani, Piekarsky, Whitted, or Sampson acted to deprive her civil rights. (Dfts' Ex. 67 (Brown Dep.) at 55-56.)

4. Ronald Burge

Burge was hired by the Harvey Police Department in October of 1982. (Dfts' 12(M) Stmt. P 229.) Burge was appointed [*90] Police Chief. (Dfts' 12(M) Stmt. P 229.)²⁶ Burge resigned as police chief on April 10, 1995 and requested a payout of all benefits accrued while an employee for Harvey. (Dfts' 12(M) Stmt. P 230.) Burge held civil service status, but he never requested a return to his status as patrol officer upon his resignation as Chief. (Dfts' 12(M) Stmt. P 231.)

Burge was an active supporter of Johnson in the April 1995 election, and Graves knew that Burge supported Johnson. (Ptfs' 12(N) Stmt. P 75.) It is [*91] undisputed that during the election campaign, Graves called Burge "a crook," "a dog," an "incompetent," and "the mayor's bagman." (Ptfs' 12(N) Stmt. P 76.) Burge also alleges that Graves stated that Burge had "destroyed" the Harvey Police Department. (Ptfs' 12(N) Stmt. P 77.)

Graves disputes that he made that statement. (Dfts' Ex. 81 (Graves Supp. Aff.) P 19.) It is undisputed that Graves made a statement regarding removing Burge from the police chief position -- what is disputed is the exact language. Plaintiffs state that Graves public stated that the first thing he would do after office was to fire Burge, (Ptfs' 12(N) Stmt. P 77), while Defendants state that Graves had stated that he would remove Burge as police chief. (Dfts' 12(N) Resp. P 77.) Burge states that he resigned after Graves's election and before Graves took office because of Graves's public statements, which Burge says included public disparagement of Burge, calling Burge racist names, and repeated promises to terminate Burge. (Ptfs' 12(N) Stmt. P 78.) Graves denies that he made such statements. (Dfts' 12(N) Resp. P 78.) After Burge resigned and Graves took office, Graves was quoted in a newspaper as stating that "he [*92] was denied the first act as mayor he was looking forward to -- firing Police Chief Ronnie Burge." (Ptfs' Ex. 8 (4/16/95 news article).)²⁷

5. Barbara L. Chalmers

Chalmers was hired by Harvey on June 2, 1992 and became the personal secretary to Mayor Johnson in September 1992. (Dfts' 12(M) Stmt. P 208; Dfts' Ex. 61 (Chalmers Dep.) at 24-27.) As secretary to the Mayor, Chalmers had daily contact with the Mayor and had several job duties, including telephone calls, typing all memoranda and correspondence, including confidential documents, receiving all documents directed to the Mayor, including his mail and internal city documents, except those documents marked "personal and confidential", and [*93] maintaining the Mayor's confidential files. (Dfts' 12(M) Stmt. P 208; Dfts' Ex. 61 (Chalmers Dep.) at 40.) In addition, Chalmers served as the office manager in accounts and finance; Chalmers served in this position for the last few months of her employment and worked about one to two hours

²⁵ Plaintiffs state that Brown was aware that these two persons retained by the Graves administration were Graves supporters. (Ptfs' 12(N) Stmt. P 74.) Defendants' challenge to this statement on lack of personal knowledge is well taken, as the cited support from Brown's deposition includes Brown's admission that she had no personal knowledge that the two employees worked in Graves's campaign. (Dfts' Ex. 67 (Brown Dep.) at 60.)

²⁶ Defendants offer a description of Burge's job duties as police chief, but Plaintiffs state that the cited exhibit (Dfts' Ex. 71) has not been authenticated and that Defendants have failed to lay any foundation for the exhibit. This point is well taken: Defendants have not identified what the document is, where it comes from, or how old it is, nor has any person attested to the authenticity of this document. As such, Defendants have failed to show that this evidence is of the type that would be admissible at trial.

²⁷ Defendants challenge the newspaper article as inadmissible hearsay. (Dfts' 12(N) Resp. P 78.) The court need not determine the validity of that challenge as the court is granting summary judgment for Defendants as to Burge on all federal claims and is dismissing Burge's defamation claims for lack of jurisdiction.

a day in the position. (Dfts' 12(M) Stmt. P 209; Dfts' Ex. 61 (Chalmers Dep.) at 29-30.) Pursuant to City Ordinance No. 2485, the position of the secretary to the Mayor is excluded from civil service protection, and Chalmers was not a member of a labor union. (Dfts' 12(M) Stmt. P 210.)

Chalmers politically supported Johnson by passing out literature and talking to people as she walked around the streets; Chalmers also served as a poll watcher. (Dfts' 12(M) Stmt. P 211.) Chalmers states that Graves came into the precinct in which Chalmers was serving as a poll watcher; Chalmers and Graves did not speak to each other; Chalmers stated that Graves saw her while she was serving as a poll watcher for Johnson. (Dfts' 12(M) Stmt. P 214; Pfts' 12(M) Resp. P 214.) Chalmers admits that she never heard anyone say that Graves was going to get rid of any one for politics or race. (Dfts' 12(M) Stmt. P 214.) Graves [*94] states that he did not see Chalmers at the poll watcher and had no knowledge of any political activity in which Chalmers engaged during the mayoral campaign of 1995. (Dfts' Ex. 81 (Graves Supp. Aff.) P 20.)

Chalmers was terminated on April 28, 1995 and replaced as confidential secretary to the Mayor by Hope Webster; while Graves states that Webster is African-American, Defendants' responses to Interrogatories, including a comprehensive list of Harvey employees, identifies her as Hispanic. (Dfts' 12(M) Stmt. P 212; Dfts' Ex. 1 (Graves Aff.) P 69; Pfts' Ex. 4 (Harvey Empl. Rec.)) The letter terminating Chalmers stated that she was terminated due to a serious shortfall of revenue. (Pfts' 12(N) Stmt. P 82.) Chalmers note that one reason why Chalmers was allegedly let go was that there were no other secretarial positions in Harvey. (Pfts' 12(N) Stmt. P 82.)

6. Charles L. Clark

The parties disagree about what Clark's initial position was when he was hired on September 21, 1992. Clark testified that he was hired as a "deputy marshal/patrolman" and that then-police chief, Virgil Poole, told him that he would have full-time police status. (Dfts' Ex. 62 (Clark Dep.) at 17.) Clark also [*95] testified that after being employed for thirty days, Clark was given a police officer patch in place of his Deputy Marshall patch and assigned to street duty. (Dfts' Ex. 62 (Clark Dep.) at 26,

31.) Defendants state that he was hired solely as a deputy marshal²⁸ and was not assigned to a patrol officer position on March 6, 1995. (Dfts' Ex. 62 (Clark Dep.) at Dep. Ex. 1 (Clark paycheck marked "deputy marshal"); *id.* at 44 (stating that March 6, 1995 was the first time that Clark saw in writing that he had been appointed patrol officer).) This dispute is significant because deputy marshalls are excluded from civil service protection and because March 6, 1995 is less than one year prior to his termination. (Dfts' 12(M) Stmt. P 216.) Defendants also note that Clark was paid for a period of time in 1994 by the Water Department and that his employment records indicate that he was a meter reader; Clark, however, denies serving as a meter reader or being otherwise employed by the Water Department. (Dfts' 12(M) Stmt. P 218; Pfts' 12(M) Resp. P 218.) Clark was disciplined twice during March 1993. (Dfts' 12(M) Stmt. P 219.)

[*96] Clark's political activity on behalf of Johnson included visiting Johnson's campaign office, wearing a Johnson campaign button, walking in a march for Johnson, and having a Johnson poster in his window. (Dfts' Ex. 62 (Clark Dep.) at 66-67.) Clark states that Barton told him that Barton didn't have to talk to Clark because Clark was a "Johnson boy." (Dfts' Ex. 62 (Clark Dep.) at 64.)

Plaintiffs state that Clark was ordered by Macklin at approximately midnight on April 13, 1995 to report to the police station with his keys, radio, badge, and ID and was told by Macklin that "If you don't come now, we'll have to come and get you." (Pfts' 12(N) Stmt. P 93.) Clark also testified that when he was fired and told to turn in his gun, he was told by Frank Sanders (the person who told him to turn in his gun) and Tony Childs that he had voted for the wrong person. (Dfts' Ex. 62 (Clark Dep.) at 64.)

Following his termination, Clark obtained employment with the Village of Phoenix's Police Department. (Pfts' 12(N) Stmt. P 96.) As previously noted, the parties dispute whether Barton announced over the intercom that Harvey police officers were not to give back up to Clark or M. Barner if they needed [*97] assistance.

7. Roderick Haynes

Haynes was hired by Harvey in December of 1991 and held many jobs with Harvey, including radio operator,

²⁸ Defendants state that Clark was hired as a temporary deputy marshal but the materials cited do not support the claim that his position was temporary. (Dfts' 12(M) Stmt. P 216.)

dispatcher, animal warden, and records clerk. (Dfts' 12(M) Stmt. P 271.) Haynes never took a civil service examination for any of these positions. (Dfts' 12(M) Stmt. P 271.) Haynes's position as records clerk was covered by the AFSCME Agreement. (Ptfs' 12(N) Stmt. P 106.) Haynes spent almost one month as a police officer in 1994 and then returned to his position as records clerk. (Dfts' 12(M) Stmt. P 272.) Haynes had taken the patrolman's exam, interviewed for the policeman's position, and begun police training school when he had to drop out when he suffered a seizure. (Dfts' 12(M) Stmt. P 273.) Haynes has had seizures since he was twelve years old. (Dfts' 12(M) Stmt. P 273.) Barton was Haynes's supervisor (i.e., held a higher rank than Haynes) when Haynes served in the records department. (Dfts' 12(M) Stmt. P 274; Ptfs' 12(N) Stmt. P 274.) Haynes was disciplined while serving in the records department. (Dfts' 12(M) Stmt. P 274.) On April 8, 1995, Haynes received a letter, signed by Plaintiff Burge, informing Haynes that he was being laid off [*98] immediately. (Dfts' 12(M) Stmt. P 275.)

Haynes supported Johnson by distributing literature and by taking to people on the streets. (Dfts' 12(M) Stmt. P 276; Dfts' Ex. 69 (Haynes Dep.) at 25-26.) Haynes stated that the basis for his harassment was that during election campaigning, Barton saw him and stated that if Graves won the election, "Haynes' ass belonged to Barton." (Dfts' 12(M) Stmt. P 277.) Haynes took that statement to mean that Barton expected to have a high ranking job in the police department if Graves won and that Haynes might not have a job if that occurred. (Dfts' Ex. 69 (Haynes Dep.) at 18-19.) Haynes also stated that Graves made a harassing comment to Haynes while Haynes was campaigning for Johnson, but Haynes did not recall any specific details of that comment. (Dfts' Ex. 69 (Haynes Dep.) at 23-24.) Defendants dispute that any of this alleged harassment occurred. (Dfts' 12(N) Resp. P 110.) On April 13, 1995, at 9:00 p.m., Haynes went to pick up his paycheck, which he requested from Barton. (Dfts' 12(M) Stmt. P 278.) Alleging that the paycheck could not be found at that time, Barton told Haynes that he was bringing Haynes back to work and that Haynes was to report [*99] to work on the 7:00 a.m. to 3:00 p.m. shift the next day. (Dfts' 12(M) Stmt. P 278.) Haynes replied, "Well,

I'm not coming back to work, I'll just be resigning then." (Dfts' 12(M) Stmt. P 278.)

Defendants and Plaintiffs differ regarding what happened next. Defendants state that Damiani entered the room, that Haynes handed her his letter of resignation, and that Damiani told Haynes that he could get his check on the upcoming Monday. (Dfts' 12(M) Stmt. P 279.) Plaintiffs state that Haynes gave his letter of resignation to a records clerk and that no one told Haynes that he could receive his check on Monday or any other day. (Ptfs' 12(N) Stmt. P 279.) Haynes never had run-ins with Barton or Damiani inside the police station. (Dfts' Ex. 69 (Haynes Dep.) at 122-23.)

Haynes alleges that while he was standing in the police station lobby asking for his check, Graves and several other people came out of the double doors to the police station, that Haynes, after saying that he would return with his attorney for the check, began walking toward the stairs, that Graves said "arrest his ass," and that four or five persons charged down the stairs after Haynes. (Ptfs' 12(N) Stmt. P 112.)²⁹ Haynes [*100] states that he was then beaten in the streets and had a gun pulled on him by one police officer, who stated, "I ought to kill your ass, shoot you right here." (Ptfs' 12(N) Stmt. P 113.) Haynes states that he was then dragged back into the police station, where another police officer told Haynes that he should not have spoken to Graves like that and beat him further and where Graves allegedly kicked Haynes in the leg. (Ptfs' 12(N) Stmt. P 113.) Defendants dispute the claim that Graves ordered an arrest of Haynes, that police officers, in obeying that order beat Haynes or threatened him, or that Graves kicked Haynes. (Dfts' 12(N) Resp. PP 112-13.) Haynes was arrested, taken to the lockup for processing, and then taken to the hospital; while Plaintiffs state that Haynes was taken to the hospital for treatment of his injuries, Defendants state that Haynes was taken to the hospital for treatment of a seizure that Haynes suffered in custody. (Ptfs' 12(N) Stmt. P 114; Dfts' 12(N) Resp. P 114.)

[*101] 8. Rufus Fisher

Fisher was first hired by Harvey in 1971 and was certified as a civil service employee effective April 28,

²⁹ Defendants' challenge to the admissibility of Graves's alleged statement on hearsay grounds is perhaps the most egregious example of their attempt to use the hearsay rules to block statements that are admissible. Under Defendants' apparent reasoning, no plaintiff could ever mount a battery claim against a person who ordered assistants to beat the plaintiff, because the order is an "out of court statement." It should be clear to Defendants, or at least to their attorneys, that that is not the state of the law.

1972. (Ptf's 12(N) Stmt. P 98.) Fisher received a letter in August 1973, signed by the president of the Civil Service Commission; the letter stated that Fisher was "certified as a civil service employee of the City of Harvey." (Ptf's 12(N) Stmt. P 98.) One year later, Ordinance No. 2016 confirmed Fisher's status as a Civil Service employee. (Ptf's 12(N) Stmt. P 98.)

When Graves took office on April 13, 1995, with 24 years of employment, Fisher had been employed in the Water Department longer than all but two other employees. (Ptf's Ex. 4 (Harvey Empl. Rec.)) Rufus Fisher held the position of Superintendent of the Water Department. (Dfts' 12(M) Stmt. P 183.) As Superintendent, Fisher reported directly to Mayor Johnson and oversaw a wide range of Water Department functions, including overseeing the addressing of complaints, taking care of the water bill to the City of Chicago, ensuring that billing of consumers was done, making bank deposits, and overseeing the personnel and their assignments. (Dfts' 12(M) Stmt. P 184; Dfts' Ex. 59 (Fisher Dep.) at 47.) [*102] Fisher supervised all personnel of the Water Department. (Dfts' Ex. 59 (Fisher Dep.) at 47-48.) Fisher also attended City Council and staff meetings representing the Water Department. (Dfts' 12(M) Stmt. P 184.) Fisher met with Mayor Johnson each month, largely about consumer complaints, and Fisher at one point in time did have conversations about updating the meter system. (Dfts' 12(M) Stmt. P 184; Ptf's 12(M) Resp. P 184; Dfts' Ex. 59 (Fisher Dep.) at 51-52, 66-67.) Fisher spent one-half of this time during any year on planning or goal oriented activities of the Water Department. (Dfts' 12(M) Stmt. P 185.) Fisher was also the highest paid employee in the Water Department; his salary was \$ 50,000. (Dfts' 12(M) Stmt. P 186.) Fisher's employment as Superintendent of the Water Department was terminated on April 24, 1995 by a letter citing budgetary problems. (Dfts' 12(M) Stmt. P 187.) Fisher was informed by Forte, Administrative Aide, and B. Alderson, Public Relations Director, that Fisher's position had been abolished. (Dfts' 12(M) Stmt. P 187.) Fisher was told that he could stay on as a meter reader, but Fisher refused. (Dfts' Stmt. P 188.) Fisher also discussed his employment with [*103] Graves who informed him that he was considering restructuring the Water Department. (Dfts' Stmt. P 189.)

While Fisher was a supporter of Johnson outside the workplace, Fisher never showed any support or any evidence of that support in the workplace. (Dfts' 12(M) Stmt. P 190.) Fisher was never told that his employment was terminated because of his support for Johnson. (Dfts' Stmt. P 191.) Fisher campaigned for Johnson by handing out campaign literature, knocked on doors, wore a campaign button, went to campaign headquarters, and was a poll watcher; Fisher testified that he was observed performing these activities by Graves supporters, including David Blair ("Blair"). (Ptf's 12(N) Stmt. P 100.) Fisher stated that Graves came into the polling place and observed Fisher serving as a poll watcher on election day. (Ptf's 12(N) Stmt. P 100.) Arrington testified that Fisher was visible in the community as a Johnson supporter. (Arrington Dep. at 21.) Graves admits that he observed Fisher distributing literature on behalf of Johnson's campaign. (Dfts' Ex. 81 (Graves Supp. Aff.) P 24.)

After the election, Forte and Alderson told Fisher that due to a restructuring, his position as superintendent [*104] was abolished and that his duties would be performed by Blair and Bill Davis, both of whom are white. (Ptf's 12(N) Stmt. P 101.) Defendants state that the reason for dismissing Fisher, rather than Blair, was that Blair had more experience with automated billing for water service. (Dfts' 12(N) Resp. P 101.) Forte and Alderson offered to permit Fisher to remain in the Water Department as a meter reader. (Dfts' 12(N) Resp. P 101.) The position of meter reader is the fifth lowest paying job out of seven job categories in the Water Department under the AFSCME agreement, with four positions (pump room attendant, meter maintainer, serviceman, and welder/mechanic) being paid more under the agreement; meter readers earned \$ 21,652 a year, or \$ 22,664 with training. (Ptf's Ex. 5 (AFSCME agreement).) Fisher was the third most senior person in the department. (Dfts' 12(N) Resp. P 103.)³⁰ Fisher felt humiliated by the suggestion that he could stay on as a meter reader. (Ptf's 12(N) Stmt. P 104.)

[*105] Fisher was put on a payment plan for some of the monies due him; under the plan, he was to receive 18 payments, one every two weeks starting on May 12, 1995. (Ptf's 12(N) Stmt. P 327; Ptf's Ex. 29 (Fisher

³⁰ Defendants dispute that Fisher had "seniority" as defined by the AFSCME Agreement. (Dfts' 12(N) Resp. P 103.) While it is true that Fisher's position as Superintendent does not appear to be covered by AFSCME, the Agreement defines seniority "as an employee's length of service as an employee of the City since his or her most recent date of hire." (Ptf's Ex. 5 (AFSCME Agreement) at 15.) While Fisher may not have had "seniority rights" under the Agreement, he had "seniority" as defined in the Agreement.

payment plan.) Defendants state that Fisher was paid in full on October 26, 1995. (Dfts' Ex. 76 (10/26/95 letter to Fisher.)

9. Henry Jefferson

Jefferson was hired by Harvey in 1985 as a supervisor of summer employees. (Dfts' 12(M) Stmt. P 260.) In November of 1986, Jefferson was terminated by Harvey due to positive findings in a drug test; Jefferson sued Harvey and reached a settlement in which Jefferson received a payment of \$ 2,500 and was reinstated and assigned to the Streets and Sanitation Department. (Dfts' 12(M) Stmt. P 261.) Approximately six to eight months later, he became a full-time meter reader. (Dfts' 12(M) Stmt. P 261.) In 1992, Jefferson was promoted to meter repairman, the position that he held until he was terminated in 1995. (Dfts' Ex. 68 (Jefferson Dep.) at 4-5.)³¹ Jefferson's job description included keeping the meter records up to date, maintaining the meters in proper working condition, testing and repair of residential meters, handling residential [*106] complaints, keeping records of all meter sets, and special jobs when assigned to do so. (Dfts' 12(M) Stmt. P 262.) Jefferson also assumed the responsibilities of the general foreman when necessary (i.e., when the general foreman was ill or on vacation); during those times, Jefferson acted as second in command and reported directly to Fisher. (Dfts' Ex. 68 (Jefferson Dep.) at 12; Dfts' 12(M) Stmt. P 263.) Jefferson's salary was raised in February of 1995 from \$ 25,637 to \$ 29,000. (Dfts' 12(M) Stmt. P 264.) At the time of his termination, Jefferson was no longer a member of the union. (Dfts' Ex. 68 (Jefferson Dep.) at 22.)

Jefferson received a letter from Graves dated April [*107] 17, 1995; the letter stated that Jefferson's position with the Water Department was terminated because of a revenue shortfall. (Dfts' 12(M) Stmt. P 265.) Jefferson testified that he believed that his duties were being conducted by a Harvey employee who had previously worked in the Department of Streets and Sanitation; that employee was not African-American. (Dfts' Ex. 68 (Jefferson Dep.) at 29-31.) Jefferson never filed a complaint with the Civil Service Commission because he believed it would have been futile. (Dfts' 12(M) Stmt. P 266.)

Jefferson assisted Johnson in his bid for reelection a couple months before the April 4, 1995 election by

distributing literature and watching the polls on election day. (Dfts' 12(M) Stmt. P 267.) Jefferson testified that Graves saw Jefferson acting as poll watcher for Johnson and that Graves knows Jefferson by name. (Dfts' Ex. 68 (Jefferson Dep.) at 60-61.)

10. Mitchell Vershner

Vershner was hired by Harvey in 1991 and terminated in 1993. (Dfts' 12(M) Stmt. P 222.) Vershner was rehired by Harvey in 1994 as a street inspector; as street inspector, Vershner inspected the conditions of alleys and streets for ordinance violations, ticketed violators, [*108] and testified at hearings where fines might be imposed for violations. (Dfts' 12(M) Stmt. P 223; Dfts' Ex. 63 (Vershner Dep.) at 49-50.) Inspectors for the Department of Streets and Public Improvements are exempt from Civil Service protection under City Ordinance No. 2485. (Dfts' 12(M) Stmt. P 222.) As of March 10, 1994, Vershner became a demolition field coordinator, the position that he held until the conclusion of his employment. (Dfts' 12(M) Stmt. P 223.) As demolition coordinator, Vershner applied for demolition permits from the Illinois Environmental Protection Association, completed asbestos inspections, and inspected properties for ordinance violations and for dangerous and uninhabitable conditions. (Dfts' 12(M) Stmt. P 223.) Approximately 75% of Vershner's time was spent on activities relating to demolition. (Dfts' 12(M) Stmt. P 224.) As demolition coordinator, Vershner earned \$ 19,080 a year. (Pfts' 12(N) Stmt. P 116.)

Vershner supported Johnson by circulating petitions, distributing handbills, poll watching, and purchasing fund raiser tickets. (Dfts' 12(M) Stmt. P 226.) Vershner testified that he believed that Graves saw him passing out Johnson literature and participating in [*109] a protest. (Dfts' 12(M) Stmt. P 226.) Arrington testified that Vershner was visible in the community as a Johnson supporter. (Arrington Dep. at 21.)

On a Monday in April, after Graves was elected Mayor, Vershner was getting out of his work day when James Harper ("Harper") approached Vershner, prevented Vershner from entering the building, and told Vershner that the mayor had said that Vershner's services were no longer needed and that Vershner was to turn in his car keys, badge, and pager and to go home. (Pfts' 12(N)

³¹ Defendants claim that Jefferson was promoted to meter repair supervisor; however, the cited materials from Jefferson's deposition, (Dfts' Ex. 68 at 4), do not support that claim. Similarly, Defendants' claim that Jefferson's position was supervisory is not supported by the cited materials from Jefferson's deposition. (Dfts' Ex. 68 at 21.)

Stmt. P 120.) Graves states that he did not tell Harper to take any action with regard to Versher's employment. (Dfts' Ex. 81 (Graves Supp. Aff.) P 27.) Versher then went to speak to Forte, but the parties dispute the details of that meeting. (Pfts' 12(N) Stmt. P 121.) Plaintiffs stated that Forte told Versher to "give me the keys. Give me the pager. We will see you. Goodbye." (Pfts' 12(N) Stmt. P 121.) Defendants states that Versher informed Forte that, he, Versher, was "here to turn in my keys and badge" and that Forte took Versher's statement as a resignation. (Dfts' 12(N) Resp. P 121.) After Versher was terminated, a cake was sent to his supervisor Charles Givens's office [*110] which read "From Nick and Chris to Mitchell and Chuck, goodbye." (Dfts' Ex. 63 (Versher Dep.) at 83-84.) Graves and Forte deny that they knew that Versher had been active in the 1995 mayoral campaign. (Dfts' 12(N) Resp. P 118.) After his termination, Versher did not request a hearing before the Civil Service Commission. (Dfts' 2(M) Stmt. P 227.)

11. Denard Eaves

Eaves was hired by the Harvey Police Department in 1980 as a patrol officer. (Dfts' 12(M) Stmt. P 244.) Eaves was promoted to sergeant in 1988 upon taking a competitive exam. (Dfts' 12(M) Stmt. P 245.) In October of 1991, Eaves was assigned by the police chief to the position of patrol commander with the rank of inspector. (Dfts' 12(M) Stmt. P 246.) In the hierarchy of the Harvey Police Department, patrol officers report to supervisors, who in turn report to watch commanders, who in turn report to the patrol commander. (Dfts' 12(M) Stmt. P 246.) Eaves held the position of patrol commander for two years, and then assumed the position of watcher commander. (Dfts' 12(M) Stmt. P 247.) In May of 1995, Eaves was demoted to watch supervisor. (Dfts' 12(M) Stmt. P 247.) Prior to being reassigned to watch supervisor, Eaves was [*111] the highest ranking sergeant in the Police Department. (Pfts' 12(N) Stmt. P 127.) Eaves was replaced by a white officer, Arnold, who was not even an officer of the Harvey Police Department when he was brought in as patrol commander in May of 1995. (Pfts' 12(N) Stmt. PP 127-28.) Damiani, who had been suspended before April 13, 1995, was returned to the police department as commander or inspector of Internal Affairs; Damiani is white. (Pfts' 12(N) Stmt. P 128.) Robert McDade ("McDade"), also white, assumed a position in internal affairs after the election; prior to receiving this position, McDade's only position with the Harvey Police Department was as a civilian volunteer. (Pfts' 12(N) Stmt. P 128; Dfts' 12(N) Resp. P 128.)

Between January 1994 and June 1995, Eaves was disciplined thirteen times for neglect of duty and incompetence. (Dfts' 12(M) Stmt. P 248.) Defendants state that Eaves was suspended pending termination on June 12, 1995, (Dfts' Ex. 66 (Eaves. Dep.) Dep. Ex. 11), while Plaintiffs stated that Eaves was suspended pending termination on May 15, 1995. (Eaves Decl. P 5.) When Eaves was suspended, Arnold, Damiani, and Vincent Rizzi escorted him out of the squad room and told [*112] him he was suspended pending termination; while Eaves states that he was not charged with any violations or given any documents concerning his suspension, Damiani states that he was charged with written charges, though she does not say when he was served. (Pfts' 12(N) Stmt. P 129; Dfts' Ex. 79 (Damiani Aff.) P 25.) On May 23, 1995, Eaves wrote the Chairmen of the Harvey Police and Fire Commission; this letter stated "As I have not received [sic] any formal charges in writing I am on this date requesting a civil service hearing before your board." (Pfts' Ex. 3 (Eaves letter).) On or about June 7, 1995, more than 20 days after Eaves was suspended, Barton filed written charges accusing Eaves of failure to assist another officer in an appropriate manner. (Pfts' 12(N) Stmt. P 131; Dfts' Ex. 78 (Barton Aff.) P 130.) Eaves states that the charge was false; Defendants dispute the claim of falsity. (Pfts' 12(N) Stmt. P 131; Dfts' 12(N) Resp. P 131.) Eaves appeared before the Civil Service Commission, comprised of Graves's appointees, on two occasions; he subsequently applied for a Temporary Restraining Order before this court, and the Civil Service proceedings were stayed by agreement of [*113] the parties. (Pfts' 12(N) Stmt. P 132; Dfts' 12(N) Resp. P 132.)

Eaves supported Johnson in his re-election bid by purchasing a campaign ticket and talking to people and asking them to vote for Johnson. (Dfts' 12(M) Stmt. P 249.) Eaves' basis for his belief that Defendants knew of his support for Johnson was that Harvey was a small town, that the atmosphere of the town was such that if you didn't show support for Graves, you were viewed as supporting Johnson, and that Barton asked Eaves to talk to Graves about the election, but Eaves refused to do so. (Dfts' 12(M) Stmt. P 249.) Eaves did not tell Barton that he was supporting Johnson. (Dfts' 12(M) Stmt. P 249.)

Shortly after Graves took office, Barton ran for a position on the pension board; Eaves removed a Barton election poster that Barton had hung in the roll call room allegedly in violation of departmental policy. (Pfts' 12(N) Stmt. P

126.) Barton then allegedly confronted Eaves stating "what kind of shit are you taking my posters down" and "you keep your hands off my shit." (Ptfs' 12(N) Stmt. P 126.) Defendants dispute both that it was against departmental policy to hang such posters in the roll call room and that Barton used [*114] the word "shit" in his confrontation with Eaves. (Dfts' 12(N) Resp. P 126.)

On January 9, 1996, Eaves authorized Harvey to answer all questions that appeared on an employment reference check forwarded by the State of Illinois Department of Corrections. (Dfts' 12(M) Stmt. P 250.) Barton answered this reference check in his position as Deputy Chief of Police. (Dfts' 12(M) Stmt. P 250.) In response to a question of whether Barton knew of any reason why Eaves should not be employed by the Department of Corrections, Barton answered "yes" and, in the explanatory section, stated that "Mr. Eaves is presently out on suspension with this Dept for incompetence. He is pending termination. Between Jan. 1994 and Mr. Eaves suspension date of June 12, 1995 Mr. Eaves received 13 disciplinaries for incompetence." (Dfts' Ex. 66 (Eaves Dep.) Dep. Ex. 11.) Barton further stated that Eaves "had worked as a employee under my command since July 1990 to June 1995" and that Eaves's quality of work was "poor," quantity of work "poor," outstanding characteristics "none," and his attendance "good." (Dfts' Ex. 66 (Eaves Dep.) Dep. Ex. 11.) Barton stated that he would not re-employ Eaves. (Dfts' Ex. 66 (Eaves Dep.) [*115] Dep. Ex. 11.) Eaves argues that these statements are untrue because the true cause for his suspension was race and political affiliation, the 13 disciplinaries only included 10 for incompetence (Dfts' Ex. 66 (Eaves Dep.) Dep. Ex. 9), all charges brought against Eaves prior to Graves taking office were rescinded (Burge Decl. PP 3-4), and Eaves did not work under Barton's command continuously between July 1980 and June 1995. (Dfts' Ex. 66 (Eaves Dep.) at 104.) Eaves obtained employment with the Illinois Department of Corrections, though Eaves notes that his application was delaying for six weeks due to an unspecified problem with his application. (Dfts' 12(M) Stmt. P 251; Ptfs' 12(M) Resp. P 251.)

Burge states that all but one of Eaves's disciplinary write-ups were rescinded by mutual agreement between Johnson, Burge, and Eaves in late 1994 or early 1995 and that the number of disciplinary write-ups for Eaves's was commensurate with other officers. (Ptfs' 12(N) Stmt. P 134.) Barton states that all of the disciplinary write-ups against Eaves were in Eaves's personnel file at the time Barton filed his charge against Eaves and

disputes the claim that the number of disciplinary write-ups [*116] for Eaves was commensurate with those of other officers but, instead, states that the Eaves's "number of disciplinaries was far above average for a sergeant in the Harvey Police Department." (Dfts' Ex. 78 (Barton Aff.) PP 30-31.) In July 1995, the month after Barton filed his charge against Eaves citing the 13 disciplinaries, Harvey's attorney dismissed all of the charges against Eaves that Eaves is alleging had previously been rescinded; thus, the only charge remaining was the claim of failure to assist another officer for which Barton had suspended Eaves. (Ptfs' 12(N) Stmt. P 135.)

12. Lee Gray

Gray retired from the Harvey Police Department on June 22, 1995; his resignation letter does not state that he was coerced or forced to retire. (Dfts' 12(M) Stmt. P 283.) Gray stated that he chose to retire rather than resign because the benefits for retirement were more lucrative than he would have received had he resigned. (Dfts' 12(M) Stmt. P 283.) Gray testified that his reasons for retiring included being subjected to greater scrutiny than were white officers and receiving worse and more dangerous assignments than did white officers. (Ptfs' 12(M) Resp. P 283; Dfts' Ex. 70 (Gray [*117] Dep.) at 21-23.) Gray did state that white officers sometimes covered the more dangerous areas. (Dfts' 12(M) Stmt. P 289; Ptfs' 12(M) Resp. P 289.) Gray received one written discipline after the change in administration; Gray states that he was falsely accused by a white supervisor. (Dfts' 12(M) Stmt. P 291; Ptfs' 12(M) Resp. P 289; Ptfs' 12(N) Stmt. P 141.) Gray also states that he was refused sick time for a medical procedure despite having provided his supervisors with documentation from his doctor regarding the illness and treatment required. (Ptfs' 12(N) Stmt. P 141.) Gray also stated that Barton told him that Barton couldn't do anything about the harassment because Gray had not voted for Graves. (Dfts' Ex. 70 (Gray Dep.) at 22-23.) Barton denies both the claim that Gray was treated differently from other officers and the claim that he spoke to Gray about Gray's political affiliation in the April 1995 election. (Dfts' Ex. 78 (Barton Aff.) PP 35-36.)

Gray passed the sergeant's exam in October 1992 and was appointed to the civil service rank of sergeant on March 31, 1995. (Dfts' 12(M) Stmt. P 284.) Gray received sergeant's pay and performed sergeant's duties until the day Graves [*118] was sworn in, at which time he was demoted to patrol officer and his pay

reduced according. (Dfts' 12(M) Stmt. P 285.) Gray did not file a complaint with the Civil Service Commission regarding his demotion. (Dfts' 12(M) Stmt. P 286.)

Gray supported Johnson by working at Johnson's campaign headquarters and serving as a poll watcher. (Dfts' 12(M) Stmt. P 287.) Gray testified that Graves and Barton witnessed Gray acting as a poll watcher for Johnson during the election. (Dfts' 12(M) Stmt. P 287.) Gray claims that he spoke with Barton after Gray was reassigned to patrol and that Barton told him that Gray did not vote for Graves, so there was nothing Barton could do for Gray. (Ptfs' 12(N) Stmt. P 140.) Barton states that he had no conversation with Gray regarding the April 1995 election or whether Gray supported Johnson or did not support Graves. (Dfts' Ex. 78 (Barton Aff.) P 5.)

Gray timely filed a charge of race discrimination with the Equal Employment Opportunity Commission ("E.E.O.C.") and received his Notice of Right to Sue. (Ptfs' 12(N) Stmt. P 144.)

D. Other class members

1. Sarah Bell

Sarah Bell ("Bell") began her employment as Harvey's comptroller in the Accounts [*119] and Finance Department in October of 1994 and was terminated in April of 1995 after the mayoral election. (Ptfs' 12(N) Stmt. P 151.) Bell is African-American and supported Johnson in the 1995 mayoral election; she attended various coffees and fundraisers to show her support. (Ptfs' 12(N) Stmt. P 152.)³² Bell alleges that after the election, but before Graves was sworn in, Graves came to her office demanding that she give him the police department paychecks. (Ptfs' 12(N) Stmt. P 153.) When Bell refused to give him the paychecks, Graves allegedly called Bell "crazy" and told her, "if you know what's good for you, you will give me those checks" and that "as of the close of business today, you are out of here." (Ptfs' 12(N) Stmt. P 153.) Graves denies these claims. (Dfts' 12(N) Resp. P 153.) Bell states that she was frightened because she had recently had problems with the Harvey Police Department and issuing her an unfounded ticket. (Ptfs' 12(N) Stmt. P 154.) Bell received a letter dated April 17, 1997, from Graves telling her that her position with Harvey was terminated due to a shortfall of revenue. (Ptfs' 12(N) Stmt. P 155.)

[*120] 2. Gilvonne Davis

Gilvonne Davis ("Davis") began working for Harvey part time in December 1992 as a clerk in the Water Department and was a Revenue Accountant when she was terminated on April 28, 1995. (Ptfs' 12(N) Stmt. P 156.) Davis is African-American and supported Johnson in his 1995 mayoral campaign; among other activities, she worked the polls for Johnson. (Ptfs' 12(N) Stmt. P 157.) Defendants deny that Graves knew of any political activity in which Davis allegedly engaged during the 1995 mayoral election. (Dfts' 12(N) Resp. P 157.) Shortly after Graves took office, Bernice Wasso told Davis to turn over all of her job duties to Camille Krencjarz (now "Krencjarz-Soria"). (Ptfs' 12(N) Stmt. P 158.) Krencjarz-Soria is Caucasian and a Graves supporter who voiced her support for Graves during the election; prior to receiving Davis's duties, Krencjarz-Soria was a payroll clerk. (Ptfs' 12(N) Stmt. P 158.) Graves denies knowing that Krencjarz-Soria was a Graves supporter. (Dfts' Ex. 81 (Graves Supp. Aff.) P 34.)

Davis learned that she was terminated on April 28, 1995, when Forte gave her a termination letter. (Ptfs' 12(N) Stmt. P 159.) Davis states that she asked Forte whether [*121] she was being terminated because of her performance and that Forte replied that performance had nothing to do with her termination and "that's politics." (Ptfs' 12(N) Stmt. P 159.) Davis states that Forte promised to give her a letter stating that she was terminated because of politics but that Forte instead gave her a letter stating that she was terminated for budgetary reasons. (Ptfs' 12(N) Stmt. P 159.) Defendants dispute the claims that Forte made any such statements or promises. (Dfts' 12(N) Resp. P 159.)

3. James Dixon

James Dixon ("J. Dixon") began working for Harvey in 1984 as a laborer. (Ptfs' 12(N) Stmt. P 160.) Plaintiffs include a letter from the Harvey Civil Service Commission stating that J. Dixon had been granted civil service status. (J. Dixon Decl., Ex. 1 (8/15/98 letter).) Dixon is African-American and supported Johnson in his 1995 campaign for mayor. (Ptfs' 12(N) Stmt. P 161.) Dixon states that Graves supporters harassed him while he was doing his job, specifically while he was taking

³² Plaintiffs also state that Graves knew of Bell's political affiliation, but their source, Bell's Declaration, does not offer a foundation for her personal knowledge of that claim. (Bell Dec. P 2.)

down signs, including Graves campaign signs, off of city property; Dixon states that one of the Graves supporters yelled to him that he wouldn't have a job the following week [*122] after the 1995 mayoral election. (Ptfs' 12(N) Stmt. P 162.) Graves denies that he knew of Dixon's political affiliation during the mayoral election or that he directed supporters to harass J. Dixon in any way during the mayoral election or to threaten J. Dixon's employment. (Dfts' Ex. 81 (Graves Supp. Aff.) P 35.) On May 8, 1995, after Graves took office, J. Dixon, who was at that time Maintenance Foreman, received a termination letter stating that his position was abolished pursuant to a budget crisis. (Ptfs' 12(N) Stmt. PP 163-64.) J. Dixon alleges that Forte told J. Dixon that Forte hated to give J. Dixon the letter because he did not believe that J. Dixon was "part of any team" but that "he had to do it." (Ptfs' 12(N) Stmt. P 164.) Forte states that he told J. Dixon that he "hated to let him go but the City had no choice given the budget crisis it was facing at the time." (Dfts' Ex. 80 (Forte Aff.) P 13.) J. Dixon states that Steve Josephson, a white Graves supporter, filled J. Dixon's former position, (Ptfs' 12(N) Stmt. P 165); Defendants state that his former position went unfilled, but that Josephson assumed some of J. Dixon's former duties while maintaining the same job that [*123] J. Dixon had previously held. (Dfts' 12(N) Resp. P 165.) J. Dixon was not permitted to return to his previous position of laborer, nor was he transferred to another department. (Ptfs' 12(N) Stmt. P 166.)

J. Dixon requested payment of his accrued vacation and sick pay, but Dixon was never paid the money he says is owed. (Ptfs' 12(N) Stmt. P 167.)

4. Theresa Dixon

Theresa Dixon ("T. Dixon") worked for Harvey as Office Manager of the Accounts and Finance Department from May 1993 through April 1995. (Ptfs' 12(N) Stmt. P 168.) T. Dixon is African-American and supported Johnson in his 1995 mayoral election by passing out literature door to door, working in his campaign office, and attending rallies and marches. (Ptfs' 12(N) Stmt. P 169.) T. Dixon states that immediately after Graves became mayor,

she was reassigned to Accounts Payable Manager and that Krencjarz-Soria was given T. Dixon's former position of Office Manager; T. Dixon had previously been Krencjarz-Soria's supervisor. (Ptfs' 12(N) Stmt. P 170.)³³ T. Dixon states that Krencjarz-Soria was aware that T. Dixon was a Johnson supporter and that Krencjarz-Soria harassed T. Dixon on a daily basis, writing her up on frivolous [*124] disciplinary charges and threatening her with future disciplinary actions. (Ptfs' 12(N) Stmt. P 171.)³⁴ T. Dixon alleges that she complained to both Forte and Graves but no action was taken; Graves and Forte deny that T. Dixon complained to them. (Ptfs' 12(N) Stmt. P 171; Dfts' 12(N) Resp. P 171.) T. Dixon, believing that the harassment would continue, resigned. (Ptfs' 12(N) Stmt. P 172.) T. Dixon alleges that she was forced to train her replacement, Lorita Landa, African-American and a vocal Graves supporter, before she left her job; Forte denies that she was forced to train Landa or that Landa took all of T. Dixon's duties, though he states that she did assume T. Dixon's duties as Accounts Payable Manager. (Ptfs' 12(N) Stmt. PP 173-74; Dfts' 12(N) Stmt. PP 173-74; Dfts' Ex. 80 (Forte Aff.) P 17.)

[*125]

5. Elvina Renee Gholson

Elvina Renee Gholson ("Gholson") is African-American and supported Johnson in his 1995 mayoral campaign by distributing literature and working the polls for Johnson. (Ptfs' 12(N) Stmt. P 175.) Defendants deny that Graves knew of any political activity by Gholson. (Dfts' 12(N) Resp. P 175.) Plaintiffs state that Graves saw Gholson working the polls on election day; Defendants dispute this claim. (Ptfs' 12(N) Stmt. P 176; Dfts' 12(N) Resp. P 176.) Gholson began working for Harvey in 1984; while it is undisputed that she was a health inspector, Defendants dispute Plaintiffs' claim that she was also a business license administrator. (Ptfs' 12(N) Stmt. P 177; Dfts' 12(N) Resp. P 177.) Gholson was a member of the AFSCME union. (Ptfs' 12(N) Stmt. P 177.)

Plaintiffs state that Gholson reported to work every day after the election, as [*126] required, until Brenda

³³ While Defendants admitted that T. Dixon was Office Manager through April 1995, (see Dfts' 12(N) Resp. P 168), they allege that T. Dixon was already Accounts Payable Manager when Graves took office. (Dfts' 12(N) Resp. P 170.) Defendants point out that Plaintiffs have previously alleged that Krencjarz-Soria assumed Davis's duties, but it is not clear whether they dispute the claim that Krencjarz-Soria was given the position of Office Manager.

³⁴ Defendants dispute this claim, but the citation given is to Graves's supplemental affidavit, which not only does not address whether Krencjarz-Soria was aware of T. Dixon's politics, but instead disavows knowledge of Krencjarz-Soria's and T. Dixon's political affiliations. (Dfts' Ex. 81 (Graves Supp. Aff.) PP 34, 36.)

Thompson ("Thompson"), who is African-American and an active Graves supporter, gave her a termination letter on April 28, 1995, stating that Gholson was terminated because of budgetary concerns. (Ptf's 12(N) Stmt. PP 178-79.) Defendants dispute the claim that Gholson reported to work and instead state that she never reported to work after the election. (Dfts' 12(N) Resp. P 178.) After Gholson was terminated, Harvey hired new employees, including Linda Siller (Thompson's sister) and Theresa Alderson, a Graves supporter and the daughter of William Alderson, who was an active supporter in Graves's campaign; both Siller and T. Alderson are African-American. (Ptf's 12(N) Stmt. P 180; Dfts' 12(N) Resp. P 180.) Gholson was not offered another position with Harvey. (Ptf's 12(N) Stmt. P 181.) Plaintiffs and Defendants dispute whether Gholson was paid vacation pay after her termination; Plaintiffs state that she was owed vacation pay and not paid, while Defendants state that she was paid for 7 vacation days. (Ptf's 12(N) Stmt. P 181; Dfts' 12(N) Resp. P 181.) Defendants state that Gholson did not file a grievance regarding her termination. (Dfts' 12(N) Resp. P 177.)

[*127] 6. Denise Kellogg

Denise Kellogg ("Kellogg") is African-American and supported Johnson in his 1995 mayoral campaign by working at his campaign office, passing out literature, and talking with Harvey residents about the reasons for electing him Mayor. (Ptf's 12(N) Stmt. P 183.) Defendants state that Graves did not know of Kellogg's political activities. (Dfts' 12(N) Resp. P 183.) Kellogg began her employment with Harvey in 1991 as a clerk and was working as an inspector in the Streets Department on May 10, 1995, when she was told by letter dated May 10, 1995, that she was terminated because of budgetary reasons. (Ptf's 12(N) Stmt. P 184.) Kellogg was a member of the AFSCME union. (Ptf's 12(N) Stmt. P 185.) Kellogg was not offered a position with another department. (Ptf's 12(N) Stmt. P 185.) Defendants state that Kellogg did not file a grievance or request a hearing concerning the termination of her employment. (Dfts' 12(N) Resp. P

185.) Kellogg states that a few days after the election, Mike Lopez, a Graves supporter in the Streets Department, told her that she "had better be careful or [she] may be found in a ditch soon." (Ptf's 12(N) Stmt. P 186.)³⁵ Kellogg states that [*128] she was owed vacation and sick pay when she was terminated but that she was not paid the moneys. (Ptf's 12(N) Stmt. P 187.) Defendants state that sick pay is not paid to persons who were separated from employment with Harvey without reaching retirement and that any accrued time was paid out to all employees terminated since April 13, 1995. (Dfts' 12(N) Resp. P 187; Dfts' Ex. 80 (Forte Aff.) PP 14, 37.)

7. Billy Moore

Billy Moore ("B. Moore") is African-American and worked for Harvey as a patrol officer from September 12, 1994 through September 12, 1995 (according to [*129] Plaintiffs) or September 5, 1995 (according to Defendants). (Ptf's 12(N) Stmt. P 188; Dfts' 12(N) Resp. P 188.) One of B. Moore's first assignments was to conduct residency checks on a number of Harvey employees; among those investigated and suspended were Damiani and Macklin, who were taken off suspension as soon as Graves took office. (Ptf's 12(N) Stmt. P 189.) B. Moore's father became critically ill in late August of 1995 and was expected to die. (Ptf's 12(N) Stmt. P 190.) B. Moore asked for time off; B. Moore states that Commander Phil Arnold ("Arnold") told him that he had to wait until his father died and that he would then be entitled to three days leave. (Ptf's 12(N) Stmt. P 190.) Defendants state that both Arnold and Damiani told B. Moore that he was entitled to three days leave upon his father's death and that he could request additional unpaid leave from the Chief or Deputy Chief. (Dfts' 12(N) Resp. P 190.) B. Moore took time off from work to be with his father; he states that he used accrued vacation and sick time. (Dfts' 12(N) Stmt. P 191.) Barton states that a probationary officer (which B. Moore was in August 1995) is not entitled to vacation days. (Dfts' 12(N) Resp. [*130] P 191; Dfts' Ex. 78 (Barton Aff.) P 37.)³⁶ Plaintiffs state that B. Moore called in each day and provided a status report as to his

³⁵ Plaintiffs also state that Kellogg learned that another Graves supporter, Donald Whitten, had stated that Graves was going to "clean house" of all Johnson supporters after Graves was elected. (Ptf's 12(N) Stmt. P 186; Kellogg Decl. P 4.) This statement is not admissible; regardless of whether Whitten's statement falls within the hearsay rule, the statement from declarant Francine Kellogg to Denise Kellogg is a clear example of hearsay.

³⁶ Defendants also state that Moore could not use sick time for this purpose, but the source to which they cite does not even mention sick time. (See Dfts' Ex. 78 (Barton Aff.) P 37.) Defendants also state that Moore was "purporting to use 'personal days' to excuse his absence from duty," but they cite to no support for this claim. (Dfts' 12(N) Resp. P 191.)

father's condition, a number where he could be reached, and his pager number. (Ptfs' 12(N) Stmt. P 192.) Defendants dispute this claim and state that B. Moore failed to call in and to keep the department apprised of his whereabouts. (Ptfs' 12(N) Stmt. P 192.)

B. Moore's father died on September 9, 1995. (Ptfs' 12(N) Stmt. P 193.) Moore states that he reported to work and told Arnold that he needed three days off work to make funeral arrangements and attend the funeral. (Ptfs' 12(N) Stmt. P 193.)³⁷ Moore returned to work [*131] on September 13, 1995. (Ptfs' 12(N) Stmt. P 194.) Damiani gave him a termination letter signed by Police Chief Hardiman stating that he was terminated for missing work. (Ptfs' 12(N) Stmt. P 194.) This letter was dated September 5, 1995; Damiani states that she was unable to give the letter to B. Moore prior to September 13, 1995 due to his absenteeism. (Dfts' Ex. 79 (Damiani Aff.) P 17.) B. Moore states that other officers' requests for time off the job were granted, including an officer who was given time to go on a fishing trip. (Ptfs' 12(N) Stmt. P 196.) Defendants state that officers' requests for time off are granted if the requesting officer has time-off options available and if the requesting officer's absence will not cause a man-power shortage or other inconvenience of the police department. (Dfts' 12(N) Stmt. P 196.)

[*132] 8. Kevin Moore

Kevin Moore ("K. Moore") is African-American and supported Johnson in his 1995 mayoral campaign by serving as a precinct captain and distributing flyers and petitions. (Ptfs' 12(N) Stmt. P 197.) K. Moore began working for Harvey in January 1995 as a patrol officer. (Ptfs' 12(N) Stmt. P 198.) K. Moore was a member of the Fraternal Order of Police, had passed the civil service test, and held civil service status. (Ptfs' 12(N) Stmt. P 198.) In December 1994, K. Moore was made Special Assistant to the Mayor. (Ptfs' 12(N) Stmt. P 198.)

The parties dispute a number of allegations made by K. Moore. First, K. Moore states that Damiani approached him in late 1994 (just before her suspension) to buy tickets to a Graves fundraiser, that K. Moore declined to buy the tickets, and that Damiani responded, "You're

going to learn." (Ptfs' 12(N) Stmt. P 199; M. Moore Decl. P 4.) Defendants dispute that Damiani had this conversation with K. Moore. (Dfts' 12(N) Stmt. P 199; Dfts' Ex. 79 (Damiani Aff.) P 18.) Second, around that time, K. Moore heard Barton state at a city council meeting that a lot of people would be in the unemployment line after the election. (Ptfs' 12(N) Stmt. [*133] P 200.)³⁸ Barton denies this claim. (Dfts' 12(N) Stmt. P 200; Dfts' Ex. 78 (Barton Aff.) P 38.) Third, after Graves was sworn in as Mayor, Damiani allegedly told K. Moore that he would have a lot of problems if he did not "go along with the flow." (Ptfs' 12(N) Stmt. P 201.) Defendants dispute this claim. (Dfts' 12(N) Resp. P 201; Dfts' Ex. 79 (Damiani Aff.) P 18.) Fourth, K. Moore claims that Damiani told him to implicate Johnson and Burge in the alleged set-up of a suspect in a shooting but that K. Moore refused to cooperate with Damiani's request on the grounds that he had no information corroborating the allegations against Johnson and Burge. (Ptfs' 12(N) Stmt. P 202; K. Moore Decl. P 6.) K. Moore also states that Damiani threatened him with suspension if he did not cooperate. (Ptfs' 12(N) Stmt. P 202; K. Moore Decl. P 6.) Damiani denies this claim and instead states that K. Moore approached her with the allegation that he had another suspect in the shooting and tried to tell Burge but that Burge told him to keep quiet about it. (Ptfs' Ex. 79 (Damiani Aff.) PP 19-20.)

[*134] K. Moore states that he resigned after he was suspended pending termination on April 24, 1995, a few days after allegedly refusing to implicate Johnson and Burge in the set-up, for having called in sick a few days. (Ptfs' 12(N) Stmt. P 203.) Damiani and Burge deny that the suspension took place but instead state that they had found out that K. Moore was seeking a position with the Markham Police Department and that Damiani, per Barton's orders, told him that he had a job with the Harvey Police Department until he was officially hired by the Markham Police Department. (Dfts' 12(N) Resp. P 203.) K. Moore also alleges that Barton told him a few days after his resignation that it was in his best interest to resign from the police force and advised K. Moore not to get involved in politics in Markham. (Ptfs' 12(N) Stmt. P 204.) Defendants dispute this claim; Barton states that he did not speak with K. Moore after K. Moore resigned. (Dfts' 12(N) Stmt. P 204; Dfts' Ex. 78 (Barton Aff.) P 39.)

³⁷ Defendants dispute this statement but the source to which they cite does not mention whether any such conversation occurred, nor does it give any dates more specific than "late August and early September 1995" when discussing B. Moore's alleged absences. (See Dfts' Ex. 85 (Arnold Aff.) P 4.)

³⁸ A

K. Moore claims that Barton harassed him at his new jobs and succeeded in getting him terminated from those jobs; the alleged harassment included Barton continually coming with Sergeant Jeff Haddon [*135] ("Haddon") to the "Club Premiere." where K. Moore was employed, Barton and Haddon patting K. Moore down and asking him if he was carrying a weapon, towing cars from the parking lot where K. Moore was employed, and telling K. Moore's boss that it was in his best interest to fire K. Moore. (Ptfs' 12(N) Stmt. P 205.) K. Moore also alleges that Barton and Haddon handcuffed K. Moore, took him to the police station, locked him in a jail cell for six hours, and questioned him, not about a criminal investigation, but about this lawsuit. (Ptfs' 12(N) Stmt. P 205.) Defendants dispute that any of this harassment occurred. (Dfts' 12(N) Resp. P 205.) K. Moore alleges that Haddon approached K. Moore in approximately April of 1996, apologized for his actions against K. Moore, and said that he was resigning from Harvey because he was sick of Graves and Barton forcing him to carry out their "political agenda." (Ptfs' 12(N) Stmt. P 206.) Haddon denies both doing the actions alleged by K. Moore and making the apology and statement about a "political agenda." (Dfts' Ex. 82 (Haddon Aff.) PP 3-4.)

9. Latresa Moore

L. Moore ("L. Moore") began her employment for Harvey in April, 1994 as a clerk in [*136] the police department and was subsequently transferred to the water department as a clerk in January 1995. (Ptfs' 12(N) Stmt. P 207.) She was a member of AFSCME. (Ptfs' 12(N) Stmt. P 207.) L. Moore is African-American and supported Johnson in his 1995 mayoral election by passing out campaign literature, marching in parades, and encouraging other citizens to vote for Johnson. (Ptfs' 12(N) Stmt. P 208.) Both Graves and Forte deny knowing of L. Moore's political activities. (Dfts' 12(N) Resp. P 208.)

L. Moore states that she was reprimanded by Dave Blair for "one minute tardies" shortly after Graves took office and then transferred to the city clerk's office to fill out birth and death certificates. (Ptfs' 12(N) Stmt. P 209.) Defendants dispute that L. Moore was transferred to the city clerk's office but instead state that she was transferred to the Finance and Accounting Office. (Dfts'

Ex. 80 (Forte Aff.) P 21.) Defendants also state that L. Moore had been reprimanded "on many occasions" for unexcused absences, as well as for tardiness and abuse of sick time. (Dfts' Ex. 80 (Forte Aff.) PP 20-21.) L. Moore alleges that Blair hired Hilda Esparza, a Graves supporter who actively campaigned [*137] for Graves's election and worked in his campaign headquarters, and that Esparza was frequently tardy and/or absent but was not transferred to another department. (Ptfs' 12(N) Stmt. P 210.) Forte states that Esparza was hired by the Johnson administration. (Dfts' Ex. 22 (Forte Aff.) P 22.)³⁹ L. Moore states that Krencjarz-Soria disciplined her three times during July 1995 for tardiness; while L. Moore states that the tardies had been excused by Krencjarz-Soria, Krencjarz-Soria denies excusing any of L. Moore's tardies. (Ptfs' 12(N) Stmt. P 211; Dfts' 12(N) Resp. P 211.) Krencjarz-Soria then terminated L. Moore for tardiness; Plaintiffs allege that the termination occurred in mid-July 1995, while Defendants allege that the termination occurred in June 1995. (Ptfs' 12(N) Stmt. P 212; Dfts' 12(N) Resp. P 212.) On July 17, 1995 (within days of L. Moore's termination according to Plaintiffs, but not according to Defendants), Christine Ceja, who is Hispanic, was hired for a clerk's position. (Ptfs' 12(N) Stmt. P 213; Dfts' 12(N) Resp. P 213.)

[*138] L. Moore did not receive a hearing regarding her termination. (Ptfs' 12(N) Stmt. P 214.) L. Moore did not file a grievance regarding the termination of her employment. (Ptfs' 12(N) Stmt. P 207.)

10. Willie B. Robinson

Willie B. Robinson ("Robinson") is African-American and did not support Graves in his mayoral election. (Ptfs' 12(N) Stmt. P 215.) Robinson was among the police officers required to conduct residency checks of Harvey employees during the Johnson administration. (Ptfs' 12(N) Stmt. P 216.) While Graves states that he is opposed to a residency requirement and refuses to enforce it, it is undisputed that "a Harvey Ordinance requires all City employees to reside in the City of Harvey within one year after they are hired." (Dfts' Ex. 81 (Graves Supp. Aff.) P 55.) Although employees were required under that Ordinance to live within the city, Robinson's investigation revealed that several employees did not live in Harvey, including Graves supporters Macklin and Damiani. (Ptfs' 12(N) Stmt. P

³⁹ Defendants also dispute the claims regarding Esparza's alleged political activities, tardiness, and absenteeism, but the source cited, Forte's affidavit, merely states that he has no knowledge regarding either such political activities or tardiness. (See Dfts' Ex. 80 (Forte Aff.) P 22.)

216.) Damiani was suspended as a result of that investigation, but she was reinstated on the day Graves took office. (Ptfs' 12(N) Stmt. P 217.)

On August 25, 1995, Robinson was terminated, [*139] allegedly due to failure to take a police report from a citizen. (Robinson Decl. P 1; Dfts' Ex. 79 (Damiani Aff.) P 22.) Robinson disputes this claim that he ever failed to perform his duties as a police officer. (Ptfs' 12(N) Stmt. P 218.)

11. Brenda Smith

Brenda Smith ("Smith") is African-American and supported Johnson in his 1995 mayoral campaign by passing out literature door to door, wearing Johnson buttons and sweatshirts, and working in Johnson's campaign headquarters, among other activities. (Ptfs' 12(N) Stmt. P 220.) Defendants state that Graves was unaware of Smith's political activities. (Dfts' 12(N) Resp. P 220.) The parties disagree about Smith's employment history with Harvey. Plaintiffs state that Smith was hired in 1993 as a consultant and was working for the Planning Department when she was terminated on April 28, 1995. (Ptfs' 12(N) Stmt. P 221.) Defendants state that Smith was hired as a City Sealer on August 23, 1993, resigned as Director of Collections on February 23, 1994, and was working as a "lien processor" on April 17, 1995 when her position was abolished. (Dfts' 12(N) Resp. P 221.) Defendants admit that Thompson handed Smith a termination letter which [*140] was dated April 28, 1995 and which stated that Smith was terminated because of budgetary reasons. (Ptfs' 12(N) Stmt. P 222.)

12. John Silas

John Silas ("Silas") is African-American and was employed by Harvey between April 28, 1985 and July 1996. (Ptfs' 12(N) Stmt. P 223.) Plaintiffs state that he worked as a driver in the Streets Department until April 13, 1995, when Graves took office but was then reassigned to a laborer position and assigned to a work crew of five to six African-American males. (Ptfs' 12(N) Stmt. P 224.) Plaintiffs state that that work crew was ordered to break up a one-foot-thick concrete floor by hand using picks and shovels. (Ptfs' 12(N) Stmt. P 225.) Silas also asserts that he was assigned to perform strenuous field work in 90 degree weather, such as cutting grass by hand and working on a blacktop truck. (Ptfs' 12(N) Stmt. P 226.) Defendants state that Silas was not reassigned to a laborer's position until March

1996 and that that reassignment was due to the privatization of the refuse service, such that, persons with more seniority "bumped" into Silas's position as driver, requiring him to be moved to the laborer position. (Dfts' Ex. 80 (Forte Aff.) [*141] P 24.) Silas disputes that claim, stating that at least one Caucasian, Richard Seput, with less seniority than Silas was permitted to be a driver after the election. (Ptfs' 12(N) Stmt. P 227.) Silas also declares that he was otherwise treated less favorably than were non-African-American employees with less seniority; for example, when Silas was accused of arriving late to work, he was threatened with suspension or given a particularly strenuous job to do, while Richard Seput was not punished for being late. (Ptfs' 12(N) Stmt. P 227.)

Silas was terminated in July 1996. (Ptfs' 12(N) Stmt. P 228.) Silas alleges that he was terminated at the end of a workday after he had injured himself doing strenuous work. (Ptfs' 12(N) Stmt. PP 228-29.) Defendants state that Silas was terminated for using city resources to do a private paving job and that Silas admitted to using the City resources to do the private paving job. (Dfts' Ex. 80 (Forte Aff.) P 25.)

13. Arnold Tate

Arnold Tate is African-American and supported David Johnson in the 1995 mayoral campaign by passing out literature door-to-door, taking with people about Johnson, putting up posters and other campaign materials for Johnson, [*142] and working the polls. (Ptfs' 12(N) Stmt. P 230.) Graves denies knowing of Tate's political activities. (Dfts' 12(N) Resp. P 230.) Tate began working for Harvey in April 1994 as a laborer in the Streets Department. (Ptfs' 12(N) Stmt. P 231.) Tate worked primarily in the Refuse Division, but also worked in the Public Property and Streets Division. (Ptfs' 12(N) Stmt. P 233.) Tate was a member of the AFSCME union. (Ptfs' 12(N) Stmt. P 239.) On April 20, 1995, Tate was terminated, allegedly for budgetary reasons. (Ptfs' 12(N) Stmt. P 237; Dfts' 12(N) Resp. P 237.)

E. Challenges to Defendants' claim that a budget crisis motivated terminations

As discussed above with regard to Plaintiffs' Motion to Strike Graves's Affidavit, Plaintiffs dispute Graves's and the other Defendants' knowledge of the financial situation of Harvey at the time of the budgetary terminations. Additionally, it is undisputed that Graves ordered payments to several of his political supporters

out of City funds, including: \$ 38,000 to Damiani to settle a suit against Harvey; \$ 9,000 to Michael Landini to settle a lawsuit against Harvey relating to his termination in 1994; \$ 7,164 to Barton to settle a lawsuit [*143] against Harvey; \$ 15,000 to Richard Seput to settle a suit against Harvey; and \$ 15,000 to Edison Torres to settle a suit against Harvey. (Ptf's 12(N) Stmt. P 287.) Additionally, rather than terminate employees, Graves could have invoked Article XIV of the AFSCME Agreement to reduce union salaries pursuant to a deficit-related wage structure, but Graves never invoked Article XIV. (Ptf's 12(N) Stmt. P 288.)

F. Residency Ordinance

Harvey has a long-standing policy under Harvey City Ordinance of requiring all of its employees to reside in the City of Harvey within one year of employment. (Ptf's 12(N) Stmt. P 317.) Beginning in 1993, Harvey began to enforce Harvey's residency ordinance. (Ptf's 12(N) Stmt. P 318.) Plaintiffs state that the Harvey included a notice informing all employees that residency within the City of Harvey had always been a requirement of City employment, posted the notice in a prominent place in every Department in the City, and instructed all Department heads to communicate the residency requirement to all employees. (Ptf's 12(N) Stmt. P 318.)

⁴⁰ Next, Linkus, an Inspector in the OPS, investigated possible residency violations without any interference [*144] or direction from the Mayor's Office; employees charged with residency violations by the OPS were permitted to present their case to the Civil Service Commission. (Ptf's 12(N) Stmt. P 319.) Graves admits that he does not enforce the residency ordinance. (Ptf's 12(N) Stmt. P 323.)

III. Summary judgment standard

HN9 Summary judgment is proper "if the pleadings, [*145] depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed.R.Civ.P. 56(c)*; *Cox v. Acme Health Serv., Inc.*, 55 F.3d 1304, 1308 (7th Cir. 1995). A genuine issue of material fact exists for trial when, in

viewing the record and all reasonable inferences drawn from it in a light most favorable to the non-movant, a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986); *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 931 (7th Cir. 1995). **HN10** The movant has the burden of establishing that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986); *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 931 (7th Cir. 1995). If the movant meets this burden, the non-movant must set forth specific facts that demonstrate the existence of a genuine issue for trial. *Fed.R.Civ.P. 56(e)*; *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553. [*146] **HN11 Rule 56(c)** mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552-53. A scintilla of evidence in support of the non-movant's position is not sufficient to oppose successfully a summary judgment motion; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 250, 106 S. Ct. at 2511.

IV. Discussion

A. Class members who retired or were terminated prior to April 13, 1995.

The court GRANTS summary judgment on the federal claims (Counts I-V and VII-IX) to Defendants as to all class members, including class representatives Burge and Haynes, who either resigned or were terminated prior to the Graves Administration taking office on April 13, 1995. The court also is using its discretion not to exercise pendent jurisdiction over Burge's state law claim against Graves both because it is factually distinct from the remaining claims in this case and because of the risk for confusion that could occur [*147] if this individual claim for a non-class member was tried with the class claims.

B. Count I (Due Process)

⁴⁰ Defendants attempt to dispute the claims regarding notice, but they do not include the deposition pages from Damiani that allegedly state that she did not recall seeing such a notice. The court cannot consider materials that have not been included in the summary judgment motion. Defendants also state that the residency ordinance was not uniformly enforced, but the only source cited for that claim is Damiani's Affidavit, which states that "several sworn police officers" including two Graves supporters, were charged with violating the residency requirements and does not mention uniform or non-uniform enforcement. (Dfts' Ex. 79 (Damiani Aff.) P 23.)

The majority of Plaintiffs' claims of Due Process violations fail because Plaintiffs did not have a protected property interest in their employment. See Johnson v. City of Fort Wayne, Ind., 91 F.3d 922, 943 (7th Cir. 1996) ("In order to assert a Fourteenth Amendment due process claim, Mr. Johnson must show that he possessed a property interest in his position . . . that is protected by the Constitution."). **HN12** Protected property interests are created independent of the Constitution and "can arise from a state statute, regulation, municipal ordinance, or an express or implied contract." *Id.* While "Illinois public employees have no presumptive property interest in their positions," Domiano v. Village of River Grove, 904 F.2d 1142, 1147 (7th Cir. 1990), some Illinois municipalities, including Harvey, have adopted a civil service system which provides protective rights to some, but not all, Harvey employees. Harvey has adopted the Illinois Municipal Code's structure for civil service, which requires a civil service examination for entrance into the civil service.

[*148] (Dfts' Ex. 54 (Harvey Ord. 2016) (adopting Illinois Municipal Code structure); 65 ILCS 5/10-1-7 (civil service examination requirement).) Harvey Ord. 2016 exempts then-current employees from the examination requirement. (Dfts' Ex. 54 (Harvey Ord. 2016).) A second possible source for a protected property right is Harvey's AFSCME union contract; the only class representative who was a member of AFSCME at the time of his or her termination is E. Barner.

The majority of the remaining Plaintiff class representatives ⁴¹ neither took a civil service examination nor were exempted from the civil service examination requirement by Ord. 2016. Only Eaves and Gray took a civil service examination, and only Fisher was exempted by Ord. 2016. The other class representatives argue that they should be found to be civil service employees, despite not taking a civil service examination, based on one of two theories. First, each of the remaining plaintiffs argue that there was a general understanding that a civil service examination was not required outside of the public safety departments. In support of this claim, Plaintiffs cite Johnson's affidavit. Second, two of the Plaintiffs, E. Barner and M. [*149] Barner, have received letters from the Civil Service Commission confirming that they are civil service employees regardless of their lack of examination. The court rejects the first argument on issue preclusion grounds but accepts the second argument.

The court accepts Defendants' issue preclusion claim regarding Beck v. Poole, 93 CH 6201, slip op. (Cir. Ct. Cook Cty. Feb. 8, 1995) (attached as Dfts' Ex. 58). Defendants seek to use this holding in this unpublished opinion to preclude Plaintiffs from alleging that there was an understanding that civil service examinations were not required for an employee, outside of the Police Department or Fire Department, to be covered by civil service. **HN13** Issue preclusion is proper if four elements are met: (1) the issue sought to [*150] be precluded must be the same as that involved in the prior action, (2) the issue must have been actually litigated, (3) the determination of the issue must have been essential to the final judgment, and (4) the party against whom estoppel is invoked must be fully represented in the prior action." La Preferida, Inc. v. Cervceria Modelo, 914 F.2d 900, 905 (7th Cir. 1990) (citation omitted). The fourth element is problematic, as none of Plaintiffs were parties to the Beck case, which involved a termination that took place more than four years prior to the events in question in this case. (Dfts' Ex. 58.) Issue preclusion might be appropriate if Beck, the plaintiff in the first case, served as a "virtual representative" of Plaintiffs, such that Beck was "so closely aligned with [Plaintiffs'] interest as to be [Plaintiffs'] virtual representative." People Who Care v. Rockford Board of Education, 68 F.3d 172, 177 (7th Cir. 1995). **HN14** The "virtual representative" doctrine seeks to guarantee that a party has had an "adequate opportunity to be heard"; a virtual representative is one who has sufficient identity with the party in a later case that a court can be assured that the [*151] party's interests have been represented in court. Tice v. American Airlines, Inc., 959 F. Supp. 928, 933 (N.D. Ill. 1997). The putative virtual representative "must have had every reason to prosecute or defend the case as vigorously' as the party to the subsequent suit." *Id.* (citations omitted). Thus, the "doctrine of 'virtual representation' recognizes, in effect, a common-law kind of class action." Ahng v. Allsteel, Inc., 96 F.3d 1033, 1037 (7th Cir. 1996).

The court finds that Beck was the virtual representative of Plaintiffs with regard to the issue of whether Harvey wrongfully failed to provide civil service hearings upon termination. In Beck's case, the Civil Service Commission ruled that it did not have jurisdiction to hear charges against her because she had not taken a civil service examination pursuant to Illinois law and, thus, was not a civil service employee. (Dfts' Ex. 58.) Thus,

⁴¹ It is undisputed that Chalmers' position was exempt from the civil service and, thus, that Harvey's civil service structure could not provide a protected property interest for her. Chalmers is not included in Count I of Plaintiffs' complaint.

Beck's appeal to the Circuit Court of Cook County dealt with the same issue raised in this Due Process claim: whether there was a general policy that a Harvey employee who did not take a civil service examination was a civil service employee. Second, there is no allegation that [*152] Beck had less reason to prosecute or to defend the case vigorously. Like Plaintiffs, she had lost her job with Harvey (albeit under a different administration) and was seeking court action on the grounds that Harvey was required to give her a hearing before the Civil Service Commission before Harvey could terminate her.

However, the holding in *Beck* does not preclude the claim that certain of the Plaintiffs may have had "a mutual understanding that [they] had a property interest in [their] position[s]." *Beck*, slip op. at 8 (Dfts' Ex. 58.) In *Beck*, the court rejected the claim that there was a general policy of granting civil service without a civil service examination. *Id.* at 6. Separately, the court noted that a mutual understanding between the city and an employee that the employee had a protected property interest in his or her employment may give rise to such a protected property interest, *id.* at 7 (citing *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972)) but found that Beck had failed to offer evidence tending to show a mutual understanding. *Id.* at 8. Like Beck, the majority of the Plaintiffs have not offered evidence tending to show a mutual understanding [*153] but instead assert a unilateral understanding, i.e., that they believed that they were protected. Two of the Plaintiffs, however, have offered evidence of such a mutual understanding: E. Barner and M. Barner, who have each proffered letters from the Civil Service Commission granting them civil service status despite their not having taken a civil service examination. The court, thus, GRANTS summary judgment in favor of Defendants as to Plaintiffs Brown, Clark, Jefferson, Versher, Haynes, and Burge on Count I (Due Process).

Defendants next argue that summary judgment should be granted as to all employees who had a protectible property interest in their employment (i.e., E. Barner, M. Barner, Fisher, Eaves, and Gray) because they did not exhaust the available state remedies by filing grievances or completing the procedures provided by the Civil Service Commission. The court has already addressed the issue of the "futility exception" to the exhaustion requirement. See *Barner v. City of Harvey*, 1997 U.S. Dist. LEXIS 3570, 1997 WL 139468, *7-8 (N.D. Ill. 1997). The court noted that the futility exception would

be applicable if plaintiffs offered evidence tending to show that the Civil Service Commission either [*154] was unavailable for a period of time due to it being disbanded or that the procedures were likely to be carried out in an "arbitrary or biased manner or would lack the impartiality mandated." *Id.* (citation omitted). A review of the facts shows that a reasonable jury could find that the a hearing in front of the Civil Service was a futile option. Some of the facts offered include removal of Commissioners for allegedly pretextual reasons, replacement of the Commissioners with Graves supporters, testimony that the new Commissioners acted in an inappropriate manner, e.g., by mocking M. Barner and her attorney and by having improper back-room discussions with M. Barner's accuser Barton, and testimony that some of the hearings involving Graves supporters (e.g., Ricky Barner) were conducted in an informal fashion, and testimony from at least one of the three Commissioners that he just agreed with whatever the Police Chief or City Attorney recommended. In view of this evidence, the court finds that summary judgment based on failure to exhaust state remedies is inappropriate.

Accordingly, summary judgment is GRANTED on Count I as to Plaintiffs Brown, Clark, Jefferson, Versher, Burge, [*155] and Haynes and DENIED as to E. Barner, M. Barner, Fisher, Eaves, and Gray.

C. Counts II (Racial Discrimination/Equal Protection) and VIII (Racial Discrimination/Title VII)

1. Standards

The *HN15* race discrimination claims, as a class action suit, involve a burden-shifting analysis. Plaintiffs initially have the burden of "demonstrating the existence of a discriminatory [termination] pattern and practice." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 359, 97 S. Ct. 1843, 1866, 52 L. Ed. 2d 396 (1977) ("Teamsters") (quoting *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 2d 444). If Plaintiffs meet that burden, then Plaintiffs will have "made out a prima facie case of discrimination against the individual class members." *Teamsters*, 431 U.S. at 359, 97 S. Ct. at 1866. The burden of production then shifts to the employer "to come forth with evidence dispelling that inference." *Id.*, 97 S. Ct. at 1867. Once the burden shifts to Defendants, the analysis is similar to the familiar *McDonnell Douglas-Burdine* framework:

⁴² **HN16** Defendants may defeat the prima facie showing either by producing evidence that Plaintiffs' [*156] proof is "inaccurate or insignificant" ... or by providing a 'nondiscriminatory explanation for the apparently discriminatory result.'" Coates v. Johnson & Johnson, 756 F.2d 524, 552 (7th Cir. 1985) (quoting Teamsters). If Defendants offer a nondiscriminatory explanation (or multiple nondiscriminatory explanations), the burden of production shifts to Plaintiffs to show "that the employer's real reason for the adverse action was discriminatory." Hill v. Burrell Communications Group, Inc., 67 F.3d 665, 667-68 (7th Cir. 1995), overruled on other grounds, O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996). See also Coates, 756 F.2d at 532 (stating that a defendant in a class action discrimination case may defeat the prima facie case by "articulating a nondiscriminatory, nonpretextual reason for every discharge.") (emphasis added). Plaintiffs retain at all times the burden of persuasion, i.e., the "ultimate burden of proving discrimination." 67 F.3d at 668.

[*157] **HN17**

Plaintiffs may prove their Title VII claim of racial discrimination via one of two theories of discrimination: disparate treatment, which requires proof of discriminatory intent to treat a person or group of persons less favorably based on an impermissible factor, such as race, or disparate impact, which requires proof that "a specified employment practice, although neutral on its face, has a disproportionately negative effect on members of a legally protected class." Vitug v. Multistate Tax Commission, 88 F.3d 506, 513 (7th Cir. 1996). Because an Equal Protection claim requires proof of discriminatory intent, proof of a disparate impact is insufficient to support an Equal Protection claim. Village of Arlington Heights v. Metropolitan Housing

Development Corp., 429 U.S. 252, 264-65, 97 S. Ct. 555, 563, 50 L. Ed. 2d 450 (1977).

HN18 Statistics are a key means of demonstrating employment discrimination in a disparate impact or disparate treatment case. Teamsters, 431 U.S. at 339-40, 97 S. Ct. at 1856-57. "Statistics showing racial of ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent [*158] explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." Id. at 340 n.20, 97 S. Ct. at 1856 n.20. In fact, 'where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.'" Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08, 97 S. Ct. 2736, 2741, 53 L. Ed. 2d 768 (1977). See also Coates, 756 F.2d at 533 ("Strong statistical evidence, without anecdotal evidence, may in some cases from a prima facie case. . .").

HN19 Statistics are not, however, entitled to reverence. See Teamsters, 431 U.S. at 340, 97 S. Ct. at 1856-57 ("Statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances."). Thus, Defendants may rebut Plaintiffs' statistical analyses, i.e., by offering more accurate statistics or by arguing that the statistical analyses are [*159] flawed. Adams v. Indiana Bell Telephone Co., 2 F. Supp. 2d 1077, 1092 (S.D. Ind. 1998). A second means of "weakening" Plaintiffs' class claim is for Defendants to offer a "successful rebuttal of each alleged instance of discrimination." Coates, 756 F.2d at 533.

⁴² Race discrimination in an individual case may be proved either by direct evidence or indirect evidence under the McDonnell Douglas burden-shifting test. Sample v. Aldi, 61 F.3d 544, 547 (7th Cir. 1995) (race). The McDonnell Douglas burden-shifting test requires a plaintiff first to establish a prima facie case creating a presumption of discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506, 113 S. Ct. 2742, 2747, 125 L. Ed. 2d 407 (1993). If the plaintiff successfully establishes her prima facie case, the defendant must then offer legitimate, nondiscriminatory reasons for its challenged employment actions in order to rebut the presumption of discrimination. Id. at 506-507, 113 S. Ct. at 2747. If the defendant offers such legitimate reasons, the burden shifts back to the plaintiff to demonstrate that the reasons offered were pretextual, i.e., were not the true justifications for the challenged employment actions, and that the plaintiff's membership in a protected class was the true reason for the actions. Id. at 507-08, 113 S. Ct. at 2747. The burden of persuasion remains at all times with the plaintiff; the defendant does not have to prove that the reasons offered were correct but, instead, "the employee's prima facie case of discrimination will be rebutted if the employer articulates lawful reasons for the action" by producing "admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 257, 101 S. Ct. 1089, 1096, 67 L. Ed. 2d 207 (1981).

2. Application

This case does not involve impressive statistical studies. Plaintiffs, rather than hiring a statistical analyst, hired a person specializing in the creation of databases to organize Harvey's payroll records into tables. Defendants, while they did hire a statistical expert, failed to include anything other than a conclusory affidavit from their expert. In the end, the tremendous drop in African-American presence in Harvey's workforce, both in general and across the board, and the "inexorable zero" means that Plaintiffs, despite their lack of statistical sophistication, have successfully shown a prima facie case both of disparate impact and disparate treatment. Defendants attempts to dispute the gross disparities demonstrated in Plaintiffs' statistics and to provide legitimate, nondiscriminatory, nonpretextual justifications for the various terminations fail.

"Statistics are not, of course, the [*160] whole answer, but nothing is as emphatic as zero. . . ." United States v. Hinds County School Board, 417 F.2d 852, 858 (5th Cir. 1969). Zero is not just another number - and zero is the precise number of non-African Americans terminated by the Graves administration for budgetary reasons. In fact, in the first two months of Graves's administration, 69 persons were separated from employment with Harvey, and all but one of those 69 were African-American. The only non-African American employee separated from employment with Harvey between April and June 1995 was a Caucasian Johnson supporter who chose to retire. The Supreme Court has noted that "fine tuning of the statistics" is not necessary in the face of "the inexorable zero." Teamsters, 431 U.S. at 342 n.23, 97 S. Ct. 1858 n.23. See also United States v. Gregory, 871 F.2d 1239, 1245 n.20 (4th Cir. 1989) (same). In cases, such as this one, the "inexorable zero" speaks volumes and clearly supports an inference of discrimination. See National Association for the Advancement of Colored People, Inc. (NAACP) v. Town of East Haven, 70 F.3d 219, 225 (2d Cir. 1995) ("The 'inexorable zero' [is] evidence that an employer in [*161] an area with a sizeable black population has never hired a single black employee - which, by itself, supports an inference of discrimination."). The "inexorable zero" argument is augmented by the simple fact that the

proportion of African-Americans in Harvey's employ dropped drastically, both overall and in every department at issue in this case. Prior to the Graves Administration taking office, there were 338 Harvey employees, including 241 African-Americans (71%). By October of 1995, after the class period closed, there were 324 Harvey employees, including 193 African-Americans (60%). Similarly, the percentages of African-Americans dropped within each of the six departments addressed in this summary judgment motion: Finance & Accounting (from 92.3% before the class period to 57.1% after), Planning (from 92.8% to 81.8%), Mayor's Office (from 100% to 58.3%), Water (from 66.7% to 56.5%), Streets (from 81% to 76%; in supervisory positions, from 85.7% to 50%), and Police (from 72.6% to 56.4%).⁴³ These drops are significant, especially when compared to the City of Harvey's population, which, by contrast, is 85.5% African-American.

[*162] Defendants seek to challenge the impact of the "inexorable zero" by two means. First, Defendants argue that the "inexorable zero" is limited to hiring or promotion cases. This argument is specious. While it is true that the cases that have dealt with the "inexorable zero" are hiring cases, there is neither reason nor case law behind the claim that "zero" somehow means something less in a class action case dealing with allegedly discriminatory firings. Cf. Adams, 2 F. Supp. 2d at 1099 (applying same rules of statistical analysis from class action hiring cases to an age discrimination reduction in force case). Second, Defendants argue that Harvey's governmental employee population should be compared to the population of the entirety of Cook County, which is 21.85% African-American, weighted by Freeman to be 51% African-American. (Freeman Aff. P 17.) This argument also fails. Defendants have completely failed to offer any evidence to support such a broad definition of the comparison population; in particular, there is no reason to believe that Harvey draws applicants from the City of Chicago or from its northern suburbs-applicants who would have a long commute to fill what are, for [*163] the most part, low-paying jobs. See Chicago Miniature Lamp Works, 947 F.2d 292 at 302 (rejecting broad comparison labor market that included entirety of the City of Chicago without reference to commuting distance; "Low-paying, unskilled jobs are more likely to

⁴³ The court notes that the numbers discussed in this opinion are not without controversy, and the court acknowledges that the parties may argue different numbers at trial. These numbers, however, are derived from the tables of Harvey employees supplied by Defendants to Plaintiffs during discovery. Thus, even if the court uses Defendants' own tables, there were significant drops in African-American representation in every single department at issue in this case.

be filled by those living closer to the site of the job, simply because the cost (including the opportunity cost of time lost) of commuting cannot be justified." More importantly, Harvey has on its books an ordinance mandating that its city employees be hired out of the City of Harvey's population. In view of this ordinance, and the lack of either evidence or argument justifying the use of a broader labor market, with or without weighting for commuting distance, this court will use the City of Harvey's population as its comparison labor market.⁴⁴ If Harvey violates its own ordinances to avoid hiring from its predominantly African-American population, it is not entitled to a reward in the form of this court's approval of such action.

[*164] As the Plaintiffs have offered statistical evidence supporting a prima facie inference of discrimination and Defendants have failed to offer evidence challenging those statistics, the court now turns to Defendants' proffer of nondiscriminatory reasons allegedly underlying their employment decisions. Plaintiffs have successfully challenged each of Defendants' reasons as pretextual.

Many of the class members were fired for alleged budgetary reasons. Plaintiffs vigorously challenge Defendants' allegations of budgetary reasons for those terminations. First, beyond the fact that 100% of the persons terminated for budgetary reasons were African-American, Plaintiffs correctly point out that Defendants have admitted that the Graves Administration had no knowledge either of how much money it had to spend or of how much it owed to creditors. The person hired to clean up the Harvey accounts in order to determine Harvey's monetary situation was not hired until July of 1995 - yet the Graves Administration started firing employees for budgetary reasons on April 17, 1995, within two business days of Graves taking office. In fact, Graves admitted that his administration still did not know the full [*165] details of the city's financial condition as of the date of his deposition in 1997. A reasonable jury could find that the terminations were not motivated by budgetary considerations because the Graves administration admittedly did not know the city's financial

condition at the time of the terminations. Second, the Graves administration hired new persons, including both replacements of some of the persons terminated for budgetary reasons and persons hired into positions that had previously been unfilled. Defendants have offered no reasons for the decision to hire new persons for these positions rather than either to keep the class members in their original positions or, alternatively, to place the class members in new positions. Third, while the payroll immediately decreased in May 1995, the payroll then increased each month throughout the class period until the first September 1995 payroll actually exceeded Johnson's last payroll.⁴⁵ Fourth, despite the alleged shortfall of money, Harvey gave large settlements of money to several Graves supporters, including Barton and Damiani. Fifth, Defendants have failed to show that there were any neutral guidelines in place. Instead, Graves and [*166] Forte personally chose whom to remove as "unnecessary" - and everyone that they viewed as unnecessary was African-American. Thus, a reasonable jury could find that the budgetary justification was pretextual. Summary judgment is DENIED for all class members terminated for budgetary reasons, including Plaintiffs Jefferson, Fisher, and Chalmers.

Defendants' second proffered reason is that they needed to terminate persons outside of the public safety departments in order to hire more police officers. This reason is significantly weakened by the fact that the budgetary justification could reasonably be viewed as pretextual; to the extent that Defendants did not know Harvey's financial situation, hired persons, or gave Graves supporters large financial settlements, the claim that Defendants [*167] needed to free up money to hire police officers is suspect. Second, this justification, while a valid governmental reason, does not dispel the inference of discrimination caused by the inexorable zero and the gross disparities in African-American representation after the class period showed by the statistics. Third, there is a genuine dispute regarding how many police officers were on duty before and after the class period; both sets of parties, purportedly relying on the same payroll documents, claim different employment numbers for the Police Department. Thus,

⁴⁴ Defendants and their statistical expert also allege flaws in Plaintiffs' statistical tables - but they do not identify what they are or cite to documents challenging the integrity of those tables. As such, Defendants have not borne their burden of producing evidence challenging Plaintiffs' statistics and removing the prima facie inference of discrimination. Additionally, the numbers used by this court in considering the six departments at issue in this case come from Defendants in discovery.

⁴⁵ The court will address Defendants' argument that the increase in payroll is attributable to the increase in police officers when addressing Defendants' proffered reason of public safety as a justification for the terminations.

Defendants' second argument also fails to dispel the inference of discrimination.

Defendants offer additional reasons for the treatment of several of the class members. While these reasons can only weaken, but not dispel, the inference of discrimination against the class as a whole, the court considers these reasons both for the impact on the class and for the impact on the individual class members. With two exceptions, these reasons also fail to justify summary judgment. First, Defendants point to disciplinary actions against E. Barner, M. Barner, and D. Eaves. As the fact section of this opinion makes clear, there are genuine, [*168] material disputes about Defendants' allegations against E. Barner, M. Barner, and D. Eaves and about Defendants' conduct in dealing with those allegations. Therefore, summary judgment would be inappropriate against those Plaintiffs. Second, Defendants note that some of the Plaintiffs, including Versher, did not file a complaint with the E.E.O.C. As this court has previously noted, *HN20* in a class action suit, a class member does not have to file with the E.E.O.C. as long as (1) at least one class representative has filed with the E.E.O.C. and (2) the non-filing class member's time for filing with the E.E.O.C. was not yet over at the time that the class action suit was filed. *Barner v. City of Harvey*, 1997 U.S. Dist. LEXIS 3570, 1997 WL 139468, *5 n.6 (N.D. Ill. 1997). Defendants have not disputed that each of these prerequisites have been met for each of the non-filing Plaintiffs. Striking those non-filing Plaintiffs as class representatives seems both inappropriate and unhelpful, as they could still remain class members, there are other class representatives who have filed with the E.E.O.C., and anecdotal evidence regarding the non-filing class members' experiences could still be provided to the jury. Fourth, [*169] Defendants note that two Plaintiffs, Burge and Haynes, either retired or were terminated prior to the Graves Administration taking office. As previously noted, Burge's retirement prevented any mistreatment of him as an employee by Defendants as employers. Therefore, summary judgment is appropriate on all federal claims relating to Burge. When Defendant Barton attempted to rescind Haynes's termination, Haynes announced that he was resigning. Haynes was allegedly beaten when he announced that he would bring his attorney to get his paycheck, but that beating was the subject of another federal lawsuit by Haynes against Harvey which Haynes admits was dismissed. Thus, not only does it appear that Haynes was not an employee during any period of time that Defendants were in power in Harvey, but the

mistreatment of Haynes was the subject of another, dismissed federal lawsuit. Accordingly, summary judgment is appropriate on all claims relating to Haynes.

Thus, summary judgment is GRANTED on Counts II and VIII only as to Plaintiffs Burge and Haynes. Summary judgment is DENIED on Counts II and VIII as to all other Plaintiffs and class members.

D. Count III (Retaliation/First Amendment)

[*170] Count III is a claim of unlawful retaliation against Plaintiffs by all Defendants except the City Council Defendants due to Plaintiffs' political affiliation with former Mayor Johnson in violation of the First Amendment. The court will first outline the principles underlying a political affiliation claim and then apply those principles.

1. Principles

HN21 As a general rule, a government may not "deny a benefit on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 2697, 33 L. Ed. 2d 570 (1972). *HN22* A court considering a claim of denial or infringement of the benefits of public employment based on First Amendment activity applies a burden-shifting test: (1) the plaintiff has the burden to show by a preponderance of the evidence that he or she engaged in constitutionally protected activity and "that this conduct was a 'substantial factor' or... a 'motivating factor'" in the [*171] denial or infringement (2) if the plaintiff meets prong (1), the burden shifts to the defendant to show "by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576, 50 L. Ed. 2d 471 (1977).

HN23 Within this general prohibition against denying benefits based on a citizen's exercise of First Amendment rights is a set of rules regarding political patronage, a political practice under which "public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party." *Elrod v. Burns*, 427 U.S. 347, 358, 96 S. Ct. 2673, 2683, 49 L. Ed. 2d 547 (1976).

Plaintiffs' *First Amendment* claim of political affiliation falls squarely within the law of political patronage.

The rules regarding political patronage spring from four core Supreme Court decisions. In *Elrod v. Burns*, the Supreme Court first pronounced that political patronage "clearly infringes *First Amendment* interests." 427 U.S. at 360, 96 S. Ct. at 2683 (plurality). **HN24** Where [*172] a government infringes on *First Amendment* interests by engaging in political dismissals or hirings, the government has the burden of showing that its actions advance an interest that is "paramount" and "of vital importance" and that the use of patronage is the least restrictive means of advancing that interest. Id. at 362, 96 S. Ct. at 2684.⁴⁶ General claims that patronage increases governmental efficiency are not sufficient to justify the use of patronage. Id. at 364, 96 S. Ct. at 2685. Similarly, arguments that patronage is somehow essential to the survival of democracy are also insufficient. Id. at 368-69, 96 S. Ct. at 2687-88. The court did recognize that "**HN25** the need for political loyalty of employees" may justify the use of patronage - but only as applied to employees in "policymaking positions." Id. at 367, 96 S. Ct. at 2687. *Elrod* defined the term "policymaking positions" very broadly because the distinction between policymaking positions, for which patronage is appropriate, and nonpolicymaking positions, for which patronage is inappropriate, is not clear; the inquiry focuses on the "nature of the responsibilities" of the position at issue, how well defined [*173] the position's responsibilities are, and "whether the employee acts as an adviser or formulates plans for the implementation of broad goals." Id. at 367-68, 96 S. Ct. at 2687. Thus, *Elrod* makes clear that a "nonpolicymaking, nonconfidential government employee" cannot be terminated or threatened with termination based solely on his or her political beliefs. Id. at 375, 96 S. Ct. at 2690 (Stewart, J., conc.).

The remaining three Supreme Court cases both clarify the definition of "policymaking positions" and expand [*174] the coverage of the *First Amendment* challenge to various patronage practices. The second case, *Branti v. Finkel*, makes two important clarifications. First, *Branti* states that **HN26** a plaintiff meets his or her burden by showing that they were terminated because of their political affiliation with a disfavored political party or

because they were not affiliated with the favored political party. 445 U.S. 507, 516-17, 100 S. Ct. 1287, 1293-94, 63 L. Ed. 2d 574 (1980). Second, *Branti* strongly warned against treating the terms "policymaking" or "confidential" position as talismen:

Under some circumstances, a position maybe appropriately considered political even though it is neither confidential nor policymaking in character. . . . It is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position. . . . In sum, **HN27** the ultimate inquiry is not whether the label "policymaking" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Id. at 518, [*175] 100 S. Ct. at 1294-95. The third case, *Rutan v. Republican Party of Illinois*, reaffirms the principles of *Elrod* and *Branti* while extending *First Amendment* protections to other patronage practices, including "promotions, transfers, and recalls after layoffs based on political affiliation or support." 497 U.S. 62, 75 110 S. Ct. 2729, 2737, 111 L. Ed. 2d 52 (1990). The final case, *O'Hare Truck Service Inc. v. City of Northlake*, extended *First Amendment* protections against patronage to independent contractors. 518 U.S. 712, 721, 116 S. Ct. 2353, 2359, 135 L. Ed. 2d 874 (1996).

Under this case law, then, there are two separate inquiries to consider: the *Mt. Healthy* burden-shifting test and the *Elrod/Branti/Rutan/O'Hare* policymaking position exception. The court will consider these two tests in reverse, i.e., will determine first whether there are any employees who, regardless of whether their claims meet the *Mt. Healthy* test, could be terminated under the policymaking position exception.

2. Analysis

a. Policymaking position exception

Defendants have fallen into the trap of believing that listing the title of an ex-employee or tagging him or her

⁴⁶ *Elrod* does not deal with the plaintiff's burden of showing that he or she was terminated or otherwise discriminated against due to patronage because *Elrod* was an appeal from a district court's dismissal of a complaint for failure to state a claim. Elrod, 427 U.S. at 350, 96 S. Ct. at 2678. As discussed further in this opinion, Plaintiffs do have the initial burden of showing that they were terminated or constructively discharged because of their political affiliation.

[*176] as "confidential" or "supervisory" is sufficient to prove that the ex-employee's position was covered by the policymaking position exception. Case law has made clear for over two decades that labels are not the key to determining whether a position is "policymaking" for purposes of the exception. See *Flenner v. Sheahan*, 107 F.3d 459, 463 (7th Cir. 1997) ("As early as 1975, this court rejected the notion that labels or job title are relevant to the inquiry into whether patronage dismissal is permissible." (citing *Burns v. Elrod*, 509 F.2d 1133, 1136, *aff'd*, *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976).) The Seventh Circuit has specifically stated that "as of 1993, the law was clear that the permissibility of dismissing an employee for patronage reasons was determined by reference to the inherent powers of the particular office, not to the title of that office." 107 F.3d at 464. Thus, Defendants' long listing of cases in which persons sharing the same titles as some of the Plaintiffs were ruled to be policymakers for purposes of the exception is not useful. Similarly, **HN28** claims that a particular person had "access to confidential information does not automatically [*177] make her a confidential employee within the meaning of *Elrod* and *Branti*. . . . In addition, merely being a supervisor/administrator is not sufficient to show that political affiliation is an appropriate requirement for the job in question." *Milazzo v. O'Connell*, 108 F.3d 129, 133 n.1 (7th Cir. 1997) (citing, *inter alia*, *Elrod* and *Meeks v. Grimes*, 779 F.2d 417, 420-421 (7th Cir. 1985).

In view of this case law, the court finds that only Fisher should be ruled a policymaker for purposes of the exception. Fisher is the only Plaintiff for whom Defendants have offered evidence showing both discretion and authority to make policy. Fisher was responsible for making policy for his Department and answered solely to Johnson. It is undisputed that Fisher had a great deal of discretion. Therefore, the court GRANTS summary judgment on Count III as to Fisher.

Defendants also claim that they should be granted qualified immunity on Count III for other employees, e.g., employees who had access to confidential information. **HN29** Qualified immunity against liability for an allegedly wrongful act is appropriate where the law rejecting the act was not "clearly established" at the time of [*178] the act. *Flenner*, 107 F.3d at 464. The court finds that qualified immunity is inappropriate in this case. As the Seventh Circuit in *Flenner* and in *Milazzo* noted, **HN30** it has long been the law, certainly since before 1995, that an employer has the burden of showing that political affiliation is a proper job

requirement for a given position and that the employer should not rely on job title or on mere access to confidential information or to a general description of a job as "supervisory." *Milazzo*, 108 F.3d at 133 n.1; *Flenner*, 107 F.3d at 463, 464. In view of that clearly established case law, it would be inappropriate to grant qualified immunity where Defendants' argument is based on such impermissible inferences.

b. *Mt. Healthy* burden-shifting test

The court finds that Plaintiffs' claims have survived the *Mt. Healthy* burden-shifting test. The first prong of the *Mt. Healthy* burden-shifting test is whether Plaintiffs engaged in constitutionally protected activity and "that this conduct was a 'substantial factor' or . . . a 'motivating factor'" in the denial or infringement. Each of Plaintiffs have produced evidence that they either engaged in the constitutionally [*179] protected activity of supporting Johnson, or the constitutionally protected activity of *not* supporting Graves, or both. The only class members addressed in this summary judgment motion who did not state any political affiliation with Johnson or a lack of political affiliation with Graves were Silas and B. Moore. In noting that some of the class members identified themselves not as supporters of Johnson but as persons who were not Graves supporter, the court is emphasizing that a person terminated for lack of political affiliation with Graves belongs in the class just as does a person who was terminated for political affiliation Johnson. Accordingly, summary judgment is GRANTED on Count III as to Silas and B. Moore.

One of the major issues in this case is whether Defendants knew of Plaintiffs' political affiliation. Plaintiffs have adduced evidence that a reasonable jury could find that Graves or Graves supporters were aware of the political affiliation of E. Barner, Gray, and Clark, (alleged statements to or by Barton regarding each one's support of Johnson), M. Barner and Brown (displayed posters on busy street in view of Graves supporters), Chalmers, Jefferson, Gray, and Gholson [*180] (Graves allegedly saw each acting as poll watchers), Versher (Graves allegedly saw distributing literature and participating in a protest), J. Dixon (alleges harassment by Graves supporters), and Eaves and K. Moore (allegedly refused overtures from Barton and Damiani to support Graves). Plaintiffs have also alleged evidence, including statements from Barton and Damiani, that a reasonable jury could find that Defendants had a plan to remove Johnson supporters and persons who were not Graves supporters, e.g.,

alleged threats from Barton and Damiani toward persons who refused to support Graves, alleged statements from Barton that he could do nothing for an employee who supported the wrong person or who was a "Johnson boy," and statements from alleged henchmen that they had acted to fulfill Graves and Barton's political agenda. Additionally, the statistics show that every person terminated with a budgetary letter was a Johnson supporter and that the vast majority of the persons separated from employment with Harvey during the class period either was a Johnson supporter or was not a Graves supporter. Finally, Plaintiffs have offered evidence that a number of Graves supporters were either [*181] hired into similar positions after Plaintiffs were terminated or were kept as employees.

For the same reasons discussed in the race discrimination section, Defendants cannot meet prong (2), i.e., that it would have reached the same decisions regardless of Plaintiffs' protected conduct.

Thus, summary judgment is GRANTED on Count III as to Burge, Haynes, Silas, and B. Moore. Summary judgment is DENIED on Count III as to all other Plaintiffs.

E. Counts IV (Civil Conspiracy/ 42 U.S.C. § 1985) and V (42 U.S.C. § 1986)

Counts IV is a 42 U.S.C. § 1985 claim against Defendants Graves, Barton, Hardiman, and Damiani in their individual capacities, and Count V is a 42 U.S.C. § 1986 claim against all Defendants including the city council defendants. Defendants' only argument for summary judgment on Counts IV and V is the intracorporate conspiracy doctrine under § 1985.⁴⁷ The intracorporate conspiracy doctrine was dealt with by this court at some length in the motion to dismiss in this case. See Barner v. City of Harvey, 1996 U.S. Dist. LEXIS 5384, 1996 WL 199745, *4-6 (N.D. Ill. 1996). In the motion to dismiss, the court discussed the case law underlying the intracorporate conspiracy doctrine, i.e., [*182] that **HN31** as a general rule, two members of the same corporation cannot conspire with each other in

violation of § 1985, *id.* at *4, and then determined that Plaintiffs' claims were more similar to the situation in Volk v. Coler, 845 F.2d 1422 (7th Cir. 1988), where the Seventh Circuit rejected application of the intracorporate conspiracy doctrine where a group of defendant used their supervisory power to commit multiple acts of sexual harassment and discrimination and then to conduct an elaborate cover-up of the wrongdoing. *Id.* at *5-6. In this case, there are significant disputes of fact regarding Defendants' actions in a number of alleged wrongful acts, including allegedly creating false justifications for terminating a number of the Defendants and preventing the exercise of due process rights by co-opting the Civil Service Commission. Thus, summary judgment on Counts IV and V would be inappropriate, except as to Plaintiffs Burge and Haynes as previously noted.

[*183] F. Counts VI (Libel Per Se & False Light/Burge), X (Libel Per Se & False Light/Eaves), and XI (Retaliation/Title VII/Eaves)

Counts X and XI allege that Barton made statements that constituted libel per se against Eaves and/or placed Eaves in a false light in violation of Illinois state law and in violation of Title VII. "**HN32** To be considered defamatory per se, the challenged statement 'must be so obviously and naturally harmful to the person to whom it refers that a showing of special damages is unnecessary.'" Anderson v. Vanden Dorpel, 172 Ill. 2d 399, 411-12, 667 N.E.2d 1296, 1301, 217 Ill. Dec. 720 (1996) (citation omitted). Included in the categories of statements considered to be defamatory per se are "language that imputes an inability to perform or want of integrity in the discharge of duties of office or employment, and language that prejudices a party, or imputes a lack of ability, in his or her trade, profession, or business. *Id.* at 412, 667 N.E.2d at 1301."⁴⁸ [*185] The court in *Anderson* dismissed a plaintiff's defamation per se claim that was based on negative comments made by the defendant employer to the plaintiff's prospective employer regarding the plaintiff's [*184] job performance on the grounds that the comments could be given an "innocent construction," such that "the

⁴⁷ Section 1986 is a derivative claim; for a § 1986 claim to survive summary judgment, a § 1985 claim must survive summary judgment. Williams v. St. Joseph Hospital, 629 F.2d 448, 452 (7th Cir. 1980); Copeland v. Northwestern Memorial Hospital, 964 F. Supp. 1225, 1241 (N.D. Ill. 1997).

⁴⁸ The court notes that Eaves has not established **HN33** special damages, where are required to state an action for defamation per quod, i.e., defamatory statements where "the defamatory character of the statement is not apparent on its face, and extrinsic facts are required to explain the defamatory meaning." Anderson, 172 Ill. 2d at 416, 667 N.E.2d at 1302. Eaves alleges that his employment by the Department of Corrections was delayed for six weeks because of Barton's reference statement, but he has offered nothing other than conjecture to support that claim.

remark, construed in context, may be understood to mean simply that the plaintiff did not fit in with the organization of the employer making the assessment and failed to perform well in that particular job setting, and not as a comment on her ability to perform in other, future positions." *Id. at 413, 667 N.E.2d at 1302*. See also *Dunlap v. Alcuin Montessori School*, 298 Ill. App. 3d 329, 698 N.E.2d 574, 232 Ill. Dec. 483, 1998 WL 405053, *7 (Ill. App. 1st Dist. 1998) (dismissing defamation claim under innocent construction rule). Thus, even if, as alleged by Eaves, the statements made in the reference check were false or were motivated by wrongful intent, Eaves's defamation claims must be dismissed.⁴⁹

[*186] As previously noted, this court is exercising its discretion not to maintain pendent jurisdiction over Count VI (Burge) after granting summary judgment as to Burge on all federal claims.

Summary judgment is GRANTED to Defendants on Counts X and XI. Count VI is DISMISSED for lack of jurisdiction.

G. Count VII (Wage Claims) and IX (Retaliation/Title VII)

Defendants' argumentation for summary judgment on these claims is one paragraph long and solely amounts to a claim that Plaintiffs had failed to offer any evidence in support of these claims. That brief argument fails. Among the evidence offered was deposition testimony

from Graves that any person who is terminated or laid off or who retires or resigns is entitled to pay for "sick time, vacation time, and holiday times." (Dfts' Ex. 74 (Graves Dep) at 192, 194, 240-41.) Graves states that the only variations in that policy is that an employee terminated for cause is not entitled to sick pay (though he or she would be entitled to vacation or holiday pay) and that an employee who retires with 20 years is entitled to accumulated 145 sick day pay. Additionally, Plaintiffs offered testimony from a number of class members stating [*187] that they had accumulated unpaid sick days and vacation days pay but that Defendants failed to pay those moneys to the various class members. In the face of this evidence, summary judgment is DENIED as to all class members who have alleged that they have not been paid accrued wages.⁵⁰ Summary judgment is GRANTED as to all class members who have not alleged that Defendants failed to pay them accrued wages, including all class representatives.

V. Conclusion

For the foregoing reasons, Defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART. Summary judgment on Count I is GRANTED as to Brown, Clark, Jefferson, Versher, Haynes, and Burge and DENIED as to E. Barner, M. Barner, Fisher, Eaves, and Gray. Summary judgment as to Counts II and VII is GRANTED as to Haynes and Burge and DENIED as to all other Plaintiffs. Summary judgment as to Count III is GRANTED as to Haynes, Burge, Fisher,

⁴⁹ Defendants correctly note that the majority of Barton's statements either were opinion (e.g., describing Eaves's quality of work as poor) or were substantially true, (e.g., stating that Eaves had received 13 disciplinaries, citing him for 11 instances of incompetence and 10 instances of neglect of duty. See *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1228 (7th Cir. 1993) (discussing substantial truth rule; "Falsehoods that do not harm the plaintiff's reputation more than a full recital of the true facts about him would do are . . . not actionable."); *Rest. (2nd) Torts* § 566 (stating that opinions are rarely actionable as defamatory unless "it implies the allegation of undisclosed defamatory facts as the basis for the opinion."). Barton's reference does state that "Eaves is presently out on suspension with this Dept. for incompetence." (Ptf's Ex. 15 (Barton ref. for Eaves).) As this court has noted, a reasonable jury could find that Eaves was suspended due to his race and/or political affiliation. However, because the court has ruled that the innocent construction rule bars Eaves's claim, the court need not rule on whether Barton's statement regarding Eaves's suspension would otherwise survive summary judgment.

The court also need not rule on whether Barton's statements were protected by the conditional privilege of a former employer to respond to a direct request for information from prospective employers. See *Delloma v. Consolidation Coal Co.*, 996 F.2d 168, 171-72 (7th Cir. 1993). See also *Kuwik v. Starmark Star Marketing and Administration, Inc.*, 156 Ill. 2d 16, 27, 188 Ill. Dec. 765, 619 N.E.2d 129 (1993) (adopting *Rest. (2nd) Torts* approach to the conditional privilege test in defamation cases); *Rest. (2nd) Torts* § 166, comment i ("Under many circumstances, a former employer of a servant is conditionally privileged to make a defamatory communication about the character or conduct of the servant to a present or prospective employer. The defamatory imputations, however, must be made for the purpose of enabling that person to protect his own interests, and they must be reasonably calculated to do so.").

⁵⁰ The court notes that neither Burge nor Haynes have asserted that

and class members Silas and B. Moore [*188] and DENIED as to all other Plaintiffs. Summary judgment as to Counts IV and V is GRANTED as to Haynes and Burge but DENIED as to all other Plaintiffs. Count VI is DISMISSED. Summary judgment as to Counts VII and IX is GRANTED as to all class representatives other than Fisher. Summary judgment as to Counts X and XI is GRANTED. Additionally, Plaintiffs' motion to strike and Defendants' motion to strike are each GRANTED

IN PART and DENIED IN PART as noted throughout the opinion. All other pending motions are MOOT.

Enter:

David H. Coar

United States District Judge

Dated: September 16, 1998



Positive

As of: October 14, 2014 1:41 PM EDT

Collins v. Cohen Pontani Lieberman & Pavane

United States District Court for the Southern District of New York

July 30, 2008, Decided; July 31, 2008, Filed

04 CV 8983(KMW)(MHD)

Reporter

2008 U.S. Dist. LEXIS 58047; 104 Fair Empl. Prac. Cas. (BNA) 111

CATRIONA COLLINS, Plaintiff, -against- COHEN PONTANI LIEBERMAN & PAVANE, Defendant.

Counsel: [*1] For Catriona Collins, Plaintiff: Bruce Lawrence Atkins, Neil H. Deutsch, LEAD ATTORNEYS, Deutsch Atkins, P.C., Hackensack, NJ; Jeanette Tejada, Deutsch Atkins, P.C., Hackensack, NJ; Andrew M Moskowitz, Law Offices of Andrew M. Moskowitz, South Orange, NJ.

For Cohen Pontani Lieberman & Pavane, Defendant: Laura Elizabeth Evangelista, Wilson, Elser, Moskowitz, Edelman & Dicker LLP (NY), New York, NY; Nancy V. Wright, Wilson Elser Moskowitz Edelman & Dicker LLP (Albany NY), Albany, NY.

Judges: Kimba M. Wood, United States District Judge.

Opinion by: Kimba M. Wood

Opinion

Opinion and Order

WOOD, U.S.D.J.:

Plaintiff Catriona Collins ("Plaintiff") brings this action against Defendant Cohen Pontani Lieberman & Pavane ("CPLP" or "Defendant"), alleging (1) employment discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and the New York City Administrative Code; and (2) breach of contract. Specifically, Plaintiff alleges

that CPLP unlawfully discriminated against her on the basis of sex by (1) denying her promotions; (2) denying her salary and billing rate increases; (3) failing to assign her adequate work; and (4) terminating her employment. ¹ Plaintiff [*2] also alleges that CPLP terminated her employment in retaliation for her complaints about sex discrimination. Finally, Plaintiff alleges that CPLP breached its contract with her, by failing to pay her a 20 percent commission on matters she originated or introduced to CPLP.

Defendant moves for partial summary judgment with respect to Plaintiff's employment discrimination and retaliation claims. ² Defendant argues that: (1) several of Plaintiff's claims are time-barred; (2) Plaintiff fails to establish a prima facie case of discrimination or retaliation with respect to any of her [*3] claims; and (3) Plaintiff does not provide any evidence that CPLP's proffered explanations for its actions are a pretext for unlawful discrimination or retaliation.

For the reasons stated below, Defendant's motion for partial summary judgment is GRANTED IN PART and DENIED IN PART.

I. Factual Background

Unless otherwise noted, the following facts are undisputed and are derived from the parties' Local Civil Rule 56.1 statements, affidavits, and other submissions. ³

A. The Parties

¹ Plaintiff's Opposition Memorandum also describes an incident where a CPLP partner did not assign a paralegal to a case managed by Plaintiff. To the extent that Plaintiff asserts a separate discrimination claim on the basis of this incident, the Court refuses to consider it. Plaintiff did not discuss the paralegal incident in her Complaint or her Equal Employment Opportunity Commission charge. Because Defendant received notice of this claim only after Plaintiff filed her opposition to summary judgment, the Court does not consider it. See Kearney v. County of Rockland, 373 F. Supp. 2d 434, 440-41 (S.D.N.Y. 2005).

² Defendant does not move for summary judgment with respect to Plaintiff's contract claim.

³ Plaintiff and Defendant each argue that the other party did not comply with Local Rule 56.1. See Local Rule 56.1 (requiring that the movant for summary judgment submit a "short and concise" statement, in numbered paragraphs, of the material facts for which

CPLP is a law firm located in New York City, specializing in intellectual property law ("IP"). CPLP's practice areas include patent, trademark, and copyright litigation; prosecution of patent applications; copyright registration; and related opinion work. ⁴ (See Def. 56.1 P 1.)

Plaintiff is a female intellectual property litigator, [*6] who joined CPLP in June or July 1997 as a litigation associate. ⁵ (See Def. 56.1 P 4; Pl. 56.1 P 4.) Prior to joining CPLP, Plaintiff worked for nine years at another law firm specializing in patents and trademarks. (See Def. 56.1 P 5.) On September 18, 2003, CPLP terminated Plaintiff's employment. (See Def. 56.1 P 13.) On April 21, 2004, Plaintiff filed a sex discrimination and retaliation charge with the Equal Employment Opportunity Commission ("EEOC") against CPLP. On August 13, 2004, the EEOC issued Plaintiff a Notice of Right to Sue. Plaintiff filed a complaint in this Court on November 12, 2004. (See Def. 56.1 PP 17-18.)

B. Salary, Billing Rate, and Promotion Decisions

Plaintiff alleges that CPLP's billing and salary cycle is October-September. (See Pl. Ex. CC; Pl. Decl. PP 40,

67.) CPLP provides annual employee performance reviews in October, at the start of this cycle. As described by Plaintiff, during these reviews, the CPLP partners inform employees about salary increases for the upcoming [*7] October-September cycle, as well as about promotion decisions. ⁶ (See, e.g., Pl. Decl. PP 28, 38, 67-68, 136.)

Plaintiff alleges that she received positive performance evaluations and significant salary increases during 1997 and 1998, her first two years at CPLP. (See Pl. Ctr. 56.1 P 2.) ⁷ She alleges that her first negative interaction with a CPLP partner occurred in or around July 1999, when a partner, Mr. Pavane ("Pavane"), informed her that he "could not talk to her" and was uncomfortable with her. ⁸ (Id.) This incident occurred at about the time Plaintiff began to originate business for CPLP. (Id.)

At her next annual review in October 1999, CPLP again awarded Plaintiff a raise, but did not raise Plaintiff's billing rate for clients. (See Pl. Decl. P 28; Pl. Ex. CC.) CPLP's then-managing partner, Mr. Cohen ("Cohen"), also informed Plaintiff [*8] that she would never become a partner in the firm because she made the partners

there is no genuine issue to be tried, and requiring the opponent to respond to each numbered paragraph and, if necessary, submit additional material facts that are in dispute). The Court finds that neither party's 56.1 Statement complies with the Local Rules, because each 56.1 Statement (1) contains legal arguments, and (2) makes more than one factual assertion per numbered paragraph.

[*4] However, in its discretion, the Court will consider Defendant's motion for partial summary judgment despite the parties' technical violation of the local rules. See *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 73 (2d Cir. 2001) ("[A] district court has broad discretion to determine whether to overlook a party's failure to comply with local court rules.").

Defendant also argues that the Court should grant it summary judgment because Plaintiff's 56.1 Statement (1) cites to a "self-serving" declaration by Plaintiff; and (2) contradicts Plaintiff's sworn deposition testimony. (See Reply 2-3.) Defendant's arguments are without merit. First, Plaintiff's declaration is admissible evidence, and it is for a jury to determine whether Plaintiff's allegations are true or merely self-serving. Second, Defendant does not establish any contradiction between Plaintiff's 56.1 Statement and her deposition testimony. In the portions of the 56.1 Statement cited by Defendant, Plaintiff asserts that the CPLP partners consistently failed to assign her sufficient work. (See Pl. Ctr. 56.1 PP 4, 11.) Defendant argues that this assertion conflicts with Plaintiff's deposition testimony, where she cited only a [*5] few instances where CPLP partners assigned work away from her to other associates. This testimony does not establish a contradiction, because Plaintiff may have had insufficient work for other reasons, including because the CPLP partners failed to assign her sufficient work in the first instance. The Court further notes that assuming arguendo that the example cited by Defendant does represent a contradiction, this contradiction would not warrant disregarding Plaintiff's entire 56.1 Statement, as urged by Defendant. Rather, the Court would disregard only the specific allegation that contradicts Plaintiff's deposition testimony. See *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001).

⁴ The parties dispute whether CPLP's practice "is based in general/industrial chemistry, physics, and electrical/mechanical engineering." (See Def. 56.1 P 1; Pl. 56.1 P 1.)

⁵ Plaintiff is not admitted to practice before the United States Patent and Trademark Office ("USPTO") and is therefore not qualified to prosecute patent applications. (See Pavane Decl. P 8.)

⁶ The partners present at Plaintiff's annual review varied each year. (See, e.g., Pl. Decl. PP 28, 44.)

⁷ CPLP did not promote Plaintiff during this period. The record before the Court does not indicate whether CPLP raised Plaintiff's billing rate during this period. (See Pl. Ex. CC.)

⁸ Pavane became CPLP's managing partner in 2000. (See Pavane Decl. P 1.)

"uncomfortable," and because the partners prided themselves on being "collegial" and like a "family." (Id.)

At Plaintiff's October 2000 review, CPLP denied Plaintiff both a salary increase and an increase in her billing rate for clients. CPLP also did not promote her to partner. (See Pl. Ex. CC.)

At Plaintiff's October 2001 review, CPLP again denied Plaintiff a salary increase and a promotion to partner. (See Pl. Ex. CC.) However, CPLP raised Plaintiff's billing rate immediately following the review. (See Pl. Decl. P50.) During her review, Plaintiff complained to the partners that she believed she was being discriminated against on the basis of sex. (See Pl. Ctr. 56.1 P 8.) In his deposition, Pavane stated that he investigated this complaint by "looking in my soul and saying am I discriminating against this woman? No. And I checked with my other partners and no one felt that anybody in the firm had discriminated against her." (See Pavane Dep. 236.) This "investigation" did not comply with CPLP's discrimination policy as described by Pavane in his deposition.⁹

At Plaintiff's October 2002 performance review, CPLP gave Plaintiff a \$ 10,000 raise and an increase to her billing rate, and Plaintiff alleges that she also received a positive evaluation of her work. (See Pl. Decl. P 68; Pl. Ex. CC.) During her review, Plaintiff asked Thomas Pontani ("Pontani"), one of CPLP's named partners, what, if any, objections he had to promoting her to a non-equity partner. Pavane interrupted, instructed Pontani not to respond, and terminated the review. Plaintiff alleges that Pavane later reprimanded her for raising the topic of promotion at her review, and stated that the partners thought she was "difficult" and that she had not expressed enough gratitude for her raise. (See Pl. Decl. PP 69-70.)

CPLP terminated Plaintiff's employment [*10] prior to her October 2003 review. However, Plaintiff cites a CPLP spreadsheet produced in discovery that lists

salary and billing rates for the October 2003-September 2004 cycle. Plaintiff argues that this spreadsheet indicates that prior to her termination, CPLP had already decided not to raise her salary for the following year or promote her to partner. (See Pl. Decl. P 136; Pl. Ex. CC.)

Plaintiff alleges discriminatory treatment with respect to CPLP's salary, billing rate, and promotion decisions, arising from the following actions: (1) CPLP's failure to promote Plaintiff to partner in 1997-2003; (2) CPLP's failure to raise Plaintiff's salary in 2000, 2001, and 2003; and (3) CPLP's failure to raise Plaintiff's billing rate in 1999 and 2000.

C. Failure to Assign Adequate Work to Plaintiff

CPLP requires that their litigators meet an annual billable hours requirement of 1800 hours. (Pavane Decl. P 13.) It is undisputed that Plaintiff did not meet this requirement in 1997-2001 or in 2003.¹⁰ (See Def. 56.1 P 9; Pl. 56.1 P 9.) However, Plaintiff alleges that she did not meet the billable hour requirement during these periods because CPLP's partners (1) refused to assign sufficient work [*11] to her; and (2) transferred work from her to other associates. (See, e.g., Pl. Ctr. 56.1 PP 4, 11; Pl. Decl. PP 95-99.) Plaintiff alleges that the CPLP partners stopped regularly assigning work to her in early 2000, and that this treatment was due to discrimination (the "work assignment claim").¹¹ (See Pl. Decl. PP 32-33.)

D. Plaintiff's Termination

CPLP terminated Plaintiff's employment on September 18, 2003. The following events leading up to Plaintiff's termination are undisputed. On September 16, 2003, Plaintiff sent an email to the CPLP partners, complaining that "all the women litigators in this firm, regardless of their level of experience or talent, have been relegated to non-partnership track support roles, thus limiting their career development as [*12] well as their ability to undertake substantive trial work." (See Pl. Ex. JJ.)

⁹ During his deposition, Pavane testified that [*9] CPLP's procedures for investigating sexual harassment claims also apply to allegations of sex discrimination. (See Pavane Dep. 235.) These procedures require a supervisor to report allegations to the Office Manager, and to maintain a written record of how the complaint was investigated and resolved. (See CPLP Sexual Harassment Policy 2-3, 5 (Nov. 9, 1998), Pl. Ex. Q.) Pavane did not indicate that he followed these procedures.

¹⁰ The parties dispute whether Plaintiff met this requirement in 2002. (See Def. 56.1 P 9; Pl. 56.1 P 9.)

¹¹ However, Plaintiff alleges that during the October 2001-September 2002 cycle, the CPLP partners assigned her sufficient work to meet CPLP's billable hours requirement. Plaintiff asserts that the partners gave her more work during this period in response to her October 2001 complaint about sex discrimination. (See Pl. 56.1 P 9.)

The following day, on September 17, 2003, Pavane sent an email to Plaintiff, expressing concern that she had bypassed CPLP's procedure for docketing papers, and that she had failed to obtain partner approval on various prebills. (See Pl. Ex. JJ.) On September 18, 2003, Plaintiff sent an email in reply to Pavane, which stated, inter alia, that Plaintiff had "good reasons" for bypassing the office procedures because CPLP paralegals failed to follow them.¹² (See Pl. Ex. MM.) Pavane sent Plaintiff a reply email that stated, "[b]ottom line is you should not alter our procedures without notifying a partner, regardless of how 'justified' you think you are," and asked Plaintiff to confirm that she would not violate CPLP's procedures. (See Pl. Ex. NN.) Following this email exchange, Plaintiff sent two additional emails, one to Pavane and one directly to the CPLP paralegals copied to Pavane, complaining that the paralegals had not followed CPLP procedures with respect to her case.¹³

That same day, Pavane informed Plaintiff that he and the other CPLP partners had decided to terminate her employment. Pavane did not give Plaintiff a reason for her termination. (See Pl. Decl. P 126.) Plaintiff alleges that she was fired due to discrimination and [*14] in retaliation for her September 16, 2003 email. (See Pl. Opp'n 17-19.) CPLP alleges that it terminated Plaintiff due to her failure to follow CPLP procedures and her subsequent emails to Pavane and the CPLP paralegals. (See Def. Reply 9.)

II. Discussion

A. Summary Judgment Standard

Summary judgment is appropriate only when the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Guilbert v.

Gardner, 480 F.3d 140, 145 (2d Cir. 2007). "[S]ubstantive law will identify which facts are material," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), and an issue of "material fact is 'genuine[]' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," id.; Mitchell v. Shane, 350 F.3d 39, 47 (2d Cir. 2003). All ambiguities must be resolved, and all inferences drawn, in favor of the non-moving party. Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 91 (2d Cir. 2001).

However, "[a] non-moving party cannot avoid summary [*15] judgment simply by asserting a 'metaphysical doubt as to the material facts.'" Woodman v. WWOR-TV, Inc., 411 F.3d 69, 75 (2d Cir. 2005) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). A non-moving party "may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence showing that [her] version of the events is not wholly fanciful." Id. (quoting Golden Pac. Bancorp v. FDIC, 375 F.3d 196, 200 (2d Cir. 2004)). Thus, a non-moving party "must 'set forth specific facts showing that there is a genuine issue for trial.'" Id. (quoting Fed. R. Civ. P. 56(e)).

B. Statute of Limitations

Defendant raises a statute of limitations defense to several of Plaintiff's claims. Before turning to the merits of Plaintiff's claims, the Court therefore considers whether Plaintiff's Title VII, state, and city claims are time-barred.

1. Title VII Claims

a. Legal Standard

A Title VII claim is "time-barred if the plaintiff, after filing a charge with an appropriate state or local agency, does not file a charge with the EEOC within 300 days after 'the alleged unlawful employment practice.'" Elmenayer

¹² Plaintiff also complained in this email that the CPLP partners had shown "complete and utter indifference" to her work, and that she [*13] "had every [reason] to believe that none of you gave a hoot what I did!" (See Pl. Ex. MM.)

¹³ Plaintiff's email to Pavane stated, "Please confirm that (1) I have the firm's assurance that the partners will instruct the paralegals to apply the firm's alleged procedures to my case . . . and (2) that I will no longer be subjected to being informed by your paralegals that 'You don't know what you are doing' . . . and the like. If you do that then perhaps we won't have a problem." (See Pl. Ex. OO.) Plaintiff's email to the paralegals described the CPLP procedures at issue and stated that "I have no problem with this if I have the assurance of the partners and paralegals that [Plaintiff's] case will henceforth be treated in accordance with the procedures which are apparently applied to cases which the partners have brought into the firm." She further instructed the paralegals about behavior she "would not tolerate." (See Pl. Ex. QQ.)

v. ABF Freight Sys., Inc., 318 F.3d 130, 133-34 (2d Cir. 2003) [*16] (quoting 42 U.S.C. § 2000e-5(e)(1)).¹⁴ There is a "narrow exception" to the Title VII limitations period, however, "when an otherwise time-barred claim is part of a 'continuing violation,'" and at least one discriminatory act falls within the limitations period. *Blake v. Bronx Lebanon Hosp. Ctr., No. 02 Civ. 3827, 2003 U.S. Dist. LEXIS 13857, 2003 WL 21910867, at *5 (S.D.N.Y. Aug. 11, 2003)*.¹⁵

The Supreme Court clarified the scope of this exception in *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002). In *Morgan*, the Supreme Court held that the continuing violation doctrine does not apply to "discrete discriminatory acts . . . , even when they are related to acts alleged in timely filed charges." *Id.* at 113. In contrast, the continuing violation [*17] exception does apply to "a series of separate acts that collectively constitute one 'unlawful employment practice,'" such as the acts underlying a hostile work environment claim. *Id.* at 117. Acts underlying a hostile work environment claim differ from discrete acts because a hostile work environment claim is "based on the cumulative effect of individual acts," *id.* at 115, while "discrete acts" each constitute a "separate actionable 'unlawful employment practice,'" *id.* at 114. "Discrete" acts include "termination, failure to promote, denial of transfer, or refusal to hire." *Id.*

b. Analysis

Plaintiff filed her EEOC claim on April 21, 2004. Thus, unless the continuing violation exception applies, any Title VII claims premised on acts that occurred prior to June 26, 2003 are time-barred. See 42 U.S.C. § 2000e-5(e)(1); *Elmenayer*, 318 F.3d at 134. The following claims fall outside this 300-day period: (1) CPLP's failure to promote Plaintiff from 1997-2002; (2)

CPLP's failure to raise Plaintiff's salary at her performance reviews in 2000 and 2001; (3) CPLP's failure to increase Plaintiff's billing rate at her performance reviews in 1999 and 2000; and (4) CPLP's failure to provide Plaintiff [*18] with adequate work prior to June 26, 2003.

Plaintiff argues that each of these claims falls under the continuing violation exception. The Court concludes that Plaintiff's promotion, salary, and billing rate claims are discrete acts that do not fall under the continuing violation exception. However, Plaintiff's work assignment claim does constitute a continuing violation.

"*Morgan* is perfectly clear that when an employee alleges 'serial violations,' i.e., a series of actionable wrongs, a timely EEOC charge must be filed with respect to each discrete alleged violation." *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 127 S. Ct. 2162, 2175, 167 L. Ed. 2d 982 (2007). Each of Plaintiff's promotion, salary, and billing rate claims are separately actionable. Accordingly, the Court concludes that these claims do not fall under the continuing violation exception.¹⁶ See *Morgan*, 536 U.S. at 114 (holding that failure to promote is a discrete act); *Ledbetter*, 127 S. Ct. at 2165 (holding that pay-setting decisions are discrete acts).

In contrast, Plaintiff's work assignment claim is analogous to the hostile work environment claim discussed in *Morgan*, and therefore falls under the continuing violation exception. Plaintiff alleges that the CPLP partners first began allocating insufficient work to her in early 2000 (see Pl. Decl. PP 32-33), and she presents multiple examples from 2000 through 2003 of CPLP partners (1) reassigning work from her, (2) denying her requests for work, and (3) conceding that they were not providing her with adequate work. (See, e.g. Pl. Decl. PP 33, 35-36, 39, 44, 61, 76-79; [*20] Pl.

¹⁴ Although a shorter time period applies in certain circumstances, see 42 U.S.C. § 2000e-5(e)(1), Defendant assumes that the longer 300-day time period applies in this action. The Court therefore applies the 300-day time period.

¹⁵ This exception applies to plaintiffs who "ha[ve] experienced a continuous practice and policy of discrimination." *Washington v. County of Rockland*, 373 F.3d 310, 317 (2d Cir. 2004) (internal quotation marks and citation omitted).

¹⁶ Plaintiff argues that the continuing violation exception applies because CPLP's multiple discriminatory acts indicate that it had an ongoing policy of discrimination. See *Washington*, 373 F.3d at 317 [*19] ("[I]f a plaintiff has experienced a continuous practice and policy of discrimination, . . . the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it.") (internal quotation marks and citation omitted). This argument is unpersuasive. Plaintiff points to no explicit CPLP policy, and makes only conclusory assertions that Defendant's discrete discriminatory acts resulted from an underlying policy. These allegations are insufficient to establish a continuing violation. See *Alungbe v. Bd. of Trs. of Conn. State Univ.*, 283 F. Supp. 2d 674, 681 (D. Conn. 2003).

Ex. E, P, W.)¹⁷ Plaintiff alleges that collectively, these acts harmed her by leaving her with insufficient work, which affected her opportunities for salary increases and promotions. (See Pavane Decl. P 13.) Thus, like a hostile work environment claim, Plaintiff's work assignment claim is "based on the cumulative effect of individual acts," Morgan, 536 U.S. at 115, which "collectively constitute one [allegedly] unlawful employment practice," id. at 117; see also Bascom v. Fried, No. 07 Civ. 677, 2008 U.S. Dist. LEXIS 25466, 2008 WL 905210, at *4 (E.D.N.Y. Mar. 31, 2008). Accordingly, the Court concludes that Plaintiff has alleged a continuing violation beginning in 2000.¹⁸ Because Plaintiff alleges that CPLP's failure to assign her sufficient work continued into the limitations period, (see Pl. Decl. P 78-79), Plaintiff's work assignment claim is not time-barred.

Thus, the Court concludes that the following Title VII claims are time-barred, and grants CPLP summary judgment with respect to these claims: (1) CPLP's failure to promote Plaintiff at her performance reviews in 1997-2002; (2) CPLP's failure to raise Plaintiff's salary at her performance reviews in 2000 and 2001; and (3) CPLP's failure to increase Plaintiff's billing rate at her performance review in 2000. The Court concludes that Plaintiff's Title VII work assignment claim is not time-barred.

2. State and City Law Claims

A New York State or New York City discrimination claim is time-barred if filed outside New York's three-year statute of limitations. See N.Y.C.P.L.R. § 214(2); Murphy v. Am. Home Prods. Corp., 58 N.Y.2d 293, 297, 448 N.E.2d 86, 461 N.Y.S.2d 232 (N.Y. 1983); Farrugia v. North Shore Univ. Hosp., 13 Misc. 3d 740, 746, 820 N.Y.S.2d 718 (N.Y. Sup. Ct. 2006). The continuing

violation doctrine applies to New York state and city claims. See Blake, 2003 U.S. Dist. LEXIS 13857, 2003 WL 21910867, at *6; Staff v. Pall Corp., 233 F. Supp. 2d 516, 527 (S.D.N.Y. 2002).

Because Plaintiff filed her complaint on November 12, 2004, any state or city law claims premised on acts that occurred prior to November 12, 2001 are time-barred, [*23] unless the continuing violation exception applies. The following claims fall outside of New York's three-year statute of limitations period: (1) CPLP's failure to promote Plaintiff to partner at her performance reviews in 1997-2001; (2) CPLP's failure to raise Plaintiff's salary at her performance reviews in 2000 and 2001; (3) CPLP's failure to increase Plaintiff's billing rate at her performance reviews in 1999 and 2000; and (4) CPLP's failure to assign Plaintiff sufficient work prior to November 12, 2001.

For the reasons set forth in Part II.B.1.b, the Court concludes that the continuing violation exception applies to Plaintiff's work assignment claim, but does not apply to Plaintiff's promotion, salary, and billing rate claims. Thus, the Court concludes that the following state and city law claims are time-barred and grants CPLP summary judgment with respect to these claims: 1) CPLP's failure to promote Plaintiff to partner at her performance reviews in 1999-2001; (2) CPLP's failure to raise Plaintiff's salary at her performance reviews in 2000 and 2001; and (3) CPLP's failure to increase Plaintiff's billing rate at her performance review in 1999 and 2000. The Court concludes that [*24] Plaintiff's state and city law work assignment claim is not time-barred.

3. Timely Claims

Thus, the following remaining claims are timely and should be addressed on the merits: (1) all claims arising

¹⁷ Plaintiff's allegation that she did not receive adequate work is further supported by her billing records, which were consistently low. (See Pavane Decl. P 13.)

¹⁸ The Court notes that in order to constitute a continuing violation, Defendant's discriminatory acts must be sufficiently continuous in time to establish a "continuum of discrimination." [*21] See Quinn v. Green Tree Credit Corp., 159 F.3d 759, 766 (2d Cir. 1998). The Court concludes that the specific examples cited by Plaintiff, coupled with the evidence that her billing rate was consistently low, is sufficient to meet this standard. In particular, Plaintiff's allegation that she received sufficient work to meet her minimum billing requirement in the October 2001-September 2002 cycle does not defeat her claim. First, considering this evidence in the light most favorable to Plaintiff, Plaintiff still may have been harmed by receiving less work than she would have if she were male. (See Pl. Decl. P 61 (alleging that in August 2002, Pavane reassigned work away from her and refused her request for additional work); Talmadge Decl. P 14 (stating that a billing rate above the minimum is generally required for partnership consideration).) Second, even if CPLP did not discriminate against Plaintiff during the October 2001 cycle, a one-year gap does not defeat a continuing violation claim if the acts before and after the gap are part of the same unlawful practice. See, e.g., Morgan, 536 U.S. at 118 (noting that a hostile work environment claim could be continuous even if no discriminatory [*22] act occurred for ten months).

from CPLP's alleged failure to provide Plaintiff with adequate work; (2) state and city law claims arising from CPLP's failure to promote Plaintiff in 2002; (3) all claims arising from CPLP's failure to promote Plaintiff in 2003; (4) all claims arising from CPLP's failure to raise Plaintiff's salary in 2003; and (5) all claims arising from Plaintiff's termination in 2003.

The Court notes that although the time-barred incidents "cannot provide an independent basis for liability, they may be utilized as circumstantial evidence of intent." Griffin v. New York City Off-Track Betting Corp., No. 98 Civ. 5278, 2002 U.S. Dist. LEXIS 2793, 2002 WL 252758, at *4 (S.D.N.Y. Feb. 20, 2002); see also Fitzgerald v. Henderson, 251 F.3d 345, 365 (2d Cir. 2001) ("A statute of limitations does not operate to bar the introduction of evidence that predates the commencement of the limitations period but that is relevant to events during the period.").

C. Discrimination Claims

1. Legal Standard

On a motion for summary judgment, claims of discrimination [*25] under Title VII, the New York State Human Rights Law, and the New York City Administrative Code are analyzed under the three-step burden-shifting framework articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).¹⁹

Pursuant to this three-step analysis, a plaintiff must first establish a prima facie case of discrimination, by "introduc[ing] evidence that raises a reasonable inference that the action taken by the employer was based on an impermissible factor." Holcomb v. Iona College, 521 F.3d 130, 138 (2d Cir. 2008). A plaintiff must show: "(1) that [s]he belonged to a protected class; (2) that [s]he was qualified for the position [s]he held [or to which she applied]; (3) that [s]he suffered an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent." Id.; see also McDonnell Douglas, 411 U.S. at 802. The burden in establishing a prima facie case is "de [*26] minimis." Woodman, 411 F.3d at 76.

Once a plaintiff establishes a prima facie case, "a presumption of discrimination arises and the burden

shifts to the defendant to proffer some legitimate, nondiscriminatory reason for the adverse decision or action." Dawson v. Bumble & Bumble, 398 F.3d 211, 216 (2d Cir. 2005) (quoting Farias v. Instructional Sys., Inc., 259 F.3d 91, 98 (2d Cir. 2001)). "This burden is only of production [of evidence], not of persuasion." Constance v. Pepsi Bottling Co., No. 03 Civ. 5009, 2007 U.S. Dist. LEXIS 62599, 2007 WL 2460688, at *14 (E.D.N.Y. Aug. 24, 2007). "If the defendant proffers such a reason, the presumption of discrimination created by the prima facie case drops out of the analysis." Dawson, 398 F.3d at 216. The plaintiff must then show, by a preponderance of the evidence, that the reason the defendant has offered is pretextual, and that the adverse action was in fact motivated by discrimination. Id.; see also McPherson v. N.Y.C. Dep't of Educ., 457 F.3d 211, 215 (2d Cir. 2006). "[T]he ultimate burden rests with the plaintiff to offer evidence sufficient to support a reasonable inference that prohibited . . . discrimination occurred." Woodman, 411 F.3d at 76 (internal quotation [*27] marks and citations omitted).

In determining the appropriateness of summary judgment, the Court must determine whether the plaintiff has presented facts pursuant to the McDonnell Douglas framework such that a reasonable jury could infer that the employer based its employment decision on an impermissible factor. See Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 173 (2d Cir. 2005). "Summary judgment should be granted sparingly when intent is at issue." Ramos v. Marriott Int'l, Inc., 134 F. Supp. 2d 328, 345 (S.D.N.Y. 2001). Moreover, "the court should not consider the record solely in piecemeal fashion, . . . for a jury, in assessing whether there was impermissible discrimination and whether the defendant's proffered explanation is a pretext for such discrimination, would be entitled to view the evidence as a whole." Howley v. Town of Stratford, 217 F.3d 141, 151 (2d Cir. 2000).

2. Analysis

The Court concludes that Defendant's motion for summary judgment should be (1) denied with respect to Plaintiff's work assignment claim; (2) denied with respect to Plaintiff's 2002 and 2003 failure to promote claims; (3) granted with respect to Plaintiff's 2003 salary claim;

¹⁹ See Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 316-17, 819 N.E.2d 998, 786 N.Y.S.2d 382 (N.Y. 2004) (applying the McDonnell Douglas framework to claims brought under the New York State Human Rights Law and the New York City Administrative Code).

and (4) granted with respect [*28] to Plaintiff's discriminatory termination claim.²⁰

a. Work Assignment Claim

Plaintiff claims that the CPLP partners discriminated against her by failing to provide her with adequate work. Defendant seeks summary judgment with respect to this claim. The Court concludes that Plaintiff has submitted sufficient evidence to survive summary judgment with respect to this claim.

i. Prima Facie Case

Pursuant to *McDonnell Douglas*, the Court first considers whether Plaintiff has presented evidence establishing a prima facie case of discrimination.²¹

a. Qualification

To establish that she was qualified for her position, Plaintiff need only show that she "possesse[d] the basic skills necessary for performance of [the] job." *Slattery v. Swiss Reinsur. Am. Corp.*, 248 F.3d 87, 92 (2d Cir. 2001) (internal quotation marks and citation omitted).

Plaintiff produced substantial evidence that she was qualified to be a litigation [*29] associate at CPLP. It is undisputed that Plaintiff has a law degree, is admitted to the New York state bar, and had nine years of work experience at another firm specializing in patent and trademark law prior to joining CPLP. (See Def. 56.1 Stat. PP 4-5.) Furthermore, "by hiring [Plaintiff], the employer itself has already expressed a belief that she is minimally qualified." *Gregory v. Daly*, 243 F.3d 687, 696 (2d Cir. 2001). Finally, Plaintiff's six-year tenure as a CPLP litigation associate lends further support to her basic qualification for the position. Thus, the Court concludes that Plaintiff has established the second element of her prima facie case.

b. Adverse Employment Action

To qualify as an "adverse employment action," an action must materially change an employee's "terms and conditions of employment," and "must be more disruptive than a mere inconvenience or an alteration of job responsibilities." *Weeks v. New York State Div. of Parole*, 273 F.3d 76, 85 (2d Cir. 2001) (internal quotation

marks and citations omitted), abrogated on other grounds by *Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106, and abrogation recognized by *Johnson v. Buffalo Police Dep't*, 46 Fed. Appx. 11, 13 (2d Cir. 2002). An action [*30] that affects an employee's "opportunit[ies] for professional growth" and promotion qualifies as an adverse employment action. See *de la Cruz v. New York City Human Res. Admin. Dep't of Soc. Servs.*, 82 F.3d 16, 21 (2d Cir. 1996); see also *Dawson v. Bumble & Bumble*, 246 F. Supp. 2d 301, 322 (S.D.N.Y. 2003) ("[A] material decrease in earning potential may qualify as an adverse employment action.").

Plaintiff alleges that the CPLP partners failed to provide her with adequate work, and Plaintiff presents evidence in support of her claim. (See, e.g., Pl. Decl. PP 33, 35-36, 39, 44, 61, 76-79; Pl. Ex. E, P, W.) This alleged failure to assign Plaintiff adequate work constitutes an adverse employment action. CPLP asserts that it considered billed hours as relevant to salary and promotion decisions. (See, e.g., Pavane Decl. P 13.) Thus, Defendant's alleged failure to provide Plaintiff with adequate work affected her opportunities for professional growth and promotion at CPLP, and therefore qualifies as an adverse employment action. Accordingly, Plaintiff satisfies the third element of her prima facie case.

c. Inference of Discrimination

To satisfy the final factor of her prima facie case, Plaintiff [*31] must submit evidence that CPLP's failure to provide her with adequate work occurred under circumstances giving rise to an inference of discrimination. The "burden on [P]laintiff is minimal at this stage." *Taylor v. Local 32E Serv. Employees Int'l Union*, 286 F. Supp. 2d 246, 253-54 (S.D.N.Y. 2003). The Court concludes that Plaintiff has presented evidence sufficient to meet this minimal burden.

First, Plaintiff presents evidence of disparate treatment. "A showing that the employer treated a similarly situated employee differently is a common and especially effective method of establishing a prima facie case of discrimination." *Hinton v. City Coll. of New York, No. 05 Civ. 8951*, 2008 U.S. Dist. LEXIS 16058, 2008 WL 591802, at *16 (S.D.N.Y. Feb. 29, 2008) (internal quotation marks and citation omitted). Plaintiff declares

²⁰ The Court addresses Plaintiff's retaliatory termination claim infra Part II.D.

²¹ It is undisputed that, as a woman, Plaintiff is a member of a protected class. Accordingly, Plaintiff has established the first factor of her prima facie case with respect to each of her discrimination claims.

that she observed that the two male senior litigation associates at CPLP were assigned new work immediately after the matter they were working on terminated, while she, the only female senior litigation associate, had to seek out work. (See, e.g., Pl. Decl. P 39, 95; Pl. Dep. 201-02.) Plaintiff also alleges that CPLP partners reassigned work away from her to male senior associates.²² (See, e.g., [*32] Pl. Decl. P 61.)

Second, Plaintiff presents evidence of a remark made by Pavane that could be construed as reflecting discriminatory animus. See *Gregory*, 243 F.3d at 697 ("[The Second Circuit has] long recognized that . . . remarks made by decisionmakers that could be viewed as reflecting a discriminatory animus may give rise to an inference of discriminatory motive.") (internal quotations marks and citation omitted). Plaintiff declared that when she requested help from Pavane in dealing with an uncooperative paralegal, he told her that she was not "sweet" enough and needed to use more "sugar" with any paralegal who was uncooperative. (See Pl. Decl. P 100.) A reasonable [*34] jury could find that Pavane's statement indicates that (1) he holds stereotypes that women should be "sweet" and non-aggressive, and (2) that Pavane believed that Plaintiff did not fit this stereotype. Pavane's comment could therefore support a jury finding that CPLP's failure to provide Plaintiff with sufficient work was motivated by Plaintiff's failure to fulfill sex stereotypes of "sweet[ness]," and therefore constituted discrimination.²³ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250, 109 S. Ct. 1775, 104 L. Ed.

2d 268 (1989) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."). The fact that Pavane is CPLP's managing partner (see Pavane Decl. P 1), and that he interacted closely with Plaintiff regarding her requests for additional work (see, e.g., Pl. Decl. PP 39, 61, 77), contributes to the probative value of this remark. See *Tomassi v. Insignia Fin. Group, Inc.*, 478 F.3d 111, 115-16 (2d Cir. 2007) (holding that remarks may be probative when they were made by a decisionmaker and could be construed as explaining why a decision was made or as evidence of a discriminatory state [*35] of mind).

Third, Plaintiff presented evidence that Pavane did not investigate her sex discrimination complaint, made during her 2001 performance review, in accordance with CPLP's discrimination policy. See *supra* Part I.B; cf. *Reed v. Conn. Dep't of Transp.*, 161 F. Supp. 2d 73, 81 (D. Conn. 2001) ("[A]n employer's noncompliance with its own affirmative action plan may be probative of discriminatory intent."). Plaintiff declares that she complained at her 2001 review that CPLP has a "gender bias problem," and specifically stated that the CPLP partners refused to assign work to her and "waited until Mr. Fazzari or Mr. Hemingway were available." (Pl. Decl. P 46.) A reasonable jury could find that Pavane's failure to investigate this complaint pursuant to CPLP's discrimination [*36] policy was evidence that he was covering up discriminatory treatment. Accordingly,

²² Defendant argues that Mr. Fazzari and Mr. Hemingway, the two men with whom Plaintiff compares herself, are not similarly situated to Plaintiff. In order to be similarly situated, "those employees must have a situation sufficiently similar to plaintiff's to support at least a minimal inference that the difference of treatment may be attributable to discrimination." *McGuinness v. Lincoln Hall*, 263 F.3d 49, 54 (2d Cir. 2001). The Court concludes that the question of whether Mr. Fazzari and Mr. Hemingway are similarly situated with Plaintiff presents a question of fact for the jury. See *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000) ("Whether two employees are similarly situated ordinarily presents a question of fact for the jury.").

Defendant's arguments to the contrary are unpersuasive. First, Defendant notes that Mr. Fazzari and Mr. Hemingway had technical degrees and handled patent prosecutions, while Plaintiff did not. (See Def. Ctr. 56.1, PP 5-6.) However, Defendant does not point to evidence regarding the number of cases assigned to Mr. Hemingway or Mr. Fazzari for which their technical expertise was relevant. Second, Defendant points to Plaintiff's [*33] statement in her deposition that she "thought" Mr. Hemingway and Mr. Fazzari might have been more experienced than her "based on their age." (See Def. Ctr. 56.1 PP 5-6; Pl. Dep. 149-51.) However, Defendant points to no direct evidence regarding Mr. Hemingway's or Mr. Fazzari's experience, nor to any evidence that this experience was relevant to the assignments they were given. The Court therefore concludes that Defendant fails to establish, as a matter of law, that Mr. Hemingway and Mr. Fazzari are not similarly situated to Plaintiff.

²³ Plaintiff also alleges that during her 1997 performance review, Pavane said that he had not been sure about her abilities because of her "damsel in distress" act. (See Pl. Decl. P 20.) This remark has weaker evidentiary value because it occurred many years before the acts underlying Plaintiff's claims and because it accompanied a positive performance review. However, the Court considers the remark as part of the entire record.

Plaintiff satisfies the fourth element of her prima facie case, and her burden at the first stage of the McDonnell Douglas burden-shifting framework.²⁴

ii. Defendant's Non-Discriminatory Reasons

Defendant asserts the following non-discriminatory reasons for CPLP's alleged failure to provide Plaintiff with adequate work: (1) Plaintiff made little or no effort to aggressively seek work; (2) Plaintiff turned down or failed to timely complete assignments; and (3) Plaintiff did not possess the requisite scientific qualifications to complete the work she complained about not receiving. Moreover, Defendant asserts as a general response to all of Plaintiff's claims that Plaintiff had inconsistent work quality and a record of unprofessional interactions and personality conflicts with CPLP partners, associates, and staff.

The Court notes that Defendant cites no evidence supporting its claim that Plaintiff did not possess the requisite scientific qualifications to complete the work that she requested.²⁵ Because Defendant does not meet its burden to produce evidence supporting this explanation, the Court will not consider it. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) (noting that the second stage of McDonnell Douglas shifts the burden of production of admissible evidence [*38] to the defendant). However, Defendant's remaining explanations are supported by citations to the record and represent legitimate non-discriminatory reasons for CPLP's alleged failure to allocate Plaintiff sufficient work. Accordingly, Defendant meets its burden at the second stage of the McDonnell Douglas framework.

iii. Pretext

Because Defendant articulated non-discriminatory reasons for CPLP's failure to provide Plaintiff with

adequate work, the Court next determines whether a reasonable jury could find that CPLP's explanation is a pretext for discrimination. The Court concludes that Plaintiff has provided sufficient evidence of pretext to survive summary judgment.

First, Plaintiff draws into question Defendant's asserted justifications for failing to give her adequate work. Plaintiff introduced evidence that she frequently sought out work from partners, creating a genuine issue of material fact regarding CPLP's claim that she did not aggressively seek work. (See Pl. Decl. PP 39, 61, 77, 78, 79; Pl. Exs. HH, GG, II.) In addition, Plaintiff's declaration disputes [*39] certain incidents described by CPLP partners regarding her alleged refusal of assignments and failure to timely complete assignments. (Compare Pavane Decl. P 15.6, Def. Ex. G, D121-23, Stuart Dep. 125-27 with Pl. Decl. PP 76, 80.) This evidence creates a factual question regarding the veracity of Defendant's explanation.

Second, Defendant's assertion that Plaintiff had inconsistent work quality and a poor working relationship with partners, associates, and staff requires a credibility determination that is properly made by a jury. For example, although Defendant asserts in its 56.1 Statement that "[l]awyers, paralegals and secretaries all complained about [P]laintiff's unprofessional interactions," Defendant cites no written record of any complaints made by non-partner employees during Plaintiff's tenure.²⁶ (See Def. 56.1 P 8.) Likewise, although Defendant submits an extensive email record documenting disputes between Plaintiff and the CPLP partners and complaints by the CPLP partners about Plaintiff's behavior and work quality, Plaintiff draws the

²⁴ Defendant also argues that Plaintiff failed to establish a prima facie case because, inter alia, (1) statistical evidence demonstrates that for an IP firm, CPLP maintained a diverse employee population; (2) other female litigation associates received adequate work and some of the work sought by Plaintiff was assigned to female associates; (3) Plaintiff made little or no effort to aggressively seek work; (4) Plaintiff turned down or failed to timely complete assignments; and (5) Plaintiff did not possess the requisite scientific qualifications to complete the work she complained about not receiving. (See Def. Mem. 13.) This evidence is not appropriately considered at the prima facie stage, where Plaintiff's burden is de minimis. See Powell v. Syracuse Univ., 580 F.2d 1150, 1155 (2d Cir. 1978) (warning that courts should not "unnecessarily collapse[] the steps suggested by McDonnell Douglas by shifting considerations which are more appropriate to the [*37] employer's rebuttal phase [to the prima facie phase]").

²⁵ Plaintiff also rebuts this claim by declaring that she "never requested work that [she] could not handle." (Pl. Decl. P 139.)

²⁶ The Court notes that Def. Ex. G, D056 appears to document a dispute between Plaintiff and CPLP's office manager. However, Defendant provides no foundation for this document and the Court therefore does not rely upon it.

credibility of this record into question.²⁷ Plaintiff cites a 2001 email from a CPLP partner to the CPLP partner list, sent the day after [*40] Plaintiff's October 2001 performance review where she complained of gender discrimination. This email notes that there "seem[s] to be a 'disconnect' between the [favorable] comments at [Plaintiff's performance] review on her work and the (lack of increased) compensation," and states that although "[t]he results may well be justified by factors other than the quality of her work, . . . we're not leaving ourselves in a good position." (See Pl. Ex. R.) A jury could find that this email supports an inference that the CPLP partners intentionally created a negative record about Plaintiff in anticipation of litigation. This interpretation is supported by the email record, which includes only one complaint about Plaintiff prior to her October 2001 performance review. (See Def. Ex. G.)

Third, although Defendant cites CPLP's record of diversity and treatment of other female associates in support of summary judgment, there are disputes of material fact regarding this record.²⁸ Defendant argues that statistical evidence demonstrates that for an intellectual property firm, CPLP maintained a diverse employee population.²⁹ Defendant cites an expert declaration, which stated that "the level of diversity at CPLP is in line with current progressive trends in the field of IP law." (Talmadge Decl. P 15.) Defendant's expert based her analysis on a firm whose "practice is predominantly in general/industrial chemistry, physics and electrical/mechanical engineering."³⁰ (*Id.* P 16.)

However, there is a dispute of fact with respect to CPLP's main practice areas. The only evidence cited by Defendant to support the expert's characterization of CPLP's practice is Mr. Pavane's declaration. (See Def. 56.1 P 1.) Plaintiff disputes this characterization of the firm's practice based on her own experiences working at CPLP, and therefore draws into [*42] question the expert declaration's critical assumption. (See Pl. Decl. P 138.)

Defendant also alleges that two female associates, Ms. Chettih and Ms. Kim, received adequate work [*43] from the CPLP partners and that Plaintiff acknowledged that some of the work she wanted was distributed to these associates. However, neither party's 56.1 Statement cites evidence regarding the overall allocation of work to Ms. Kim or Ms. Chettih, or the total number of hours that they billed each year. Absent such information, the fact that CPLP partners assigned female associates to work on cases for which Plaintiff wanted to be assigned does not demonstrate that CPLP treated other female associates similarly to male associates. Furthermore, there is a question of fact regarding whether Ms. Chettih and Ms. Kim are similarly situated to Plaintiff, and therefore the extent to which their experiences draw into question Plaintiff's allegations of discrimination.³¹

Accordingly, the Court concludes that summary judgment on the work assignment claim is not appropriate based on (1) Plaintiff's prima facie evidence

²⁷ Defendant also submitted deposition testimony from CPLP partners and staff describing alleged conflicts with Plaintiff and their perceptions of her poor attitude and inconsistent work quality. [*41] In light of the disputes of fact described above, the Court concludes that a jury is best situated to evaluate the credibility of this testimony.

²⁸ Defendant also points to other evidence in support of summary judgment, including (1) that the same CPLP partners accused of discriminating against Plaintiff also participated in her hiring, (2) that CPLP regularly increased the salaries of other female associates, and (3) that there were male associates who did not receive salary increases. Although this evidence weighs against Plaintiff's discrimination claim, it is the role of a jury to balance the evidence. See Rule v. Brine, Inc., 85 F.3d 1002, 1011 (2d Cir. 1996) ("Any weighing of the evidence is the prerogative of the finder of fact, not an exercise for the court on summary judgment.").

²⁹ The Court is entitled to "consider the . . . mix of the work force when trying to make the determination as to [Defendant's] motivation." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 580, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978).

³⁰ The declaration stated that there are "very few women attorneys with the requisite technical qualifications and background" to practice in those areas. (Talmadge Decl. P 16.)

³¹ Plaintiff presented evidence that Ms. Chettih spent most of her time reviewing and summarizing documents in pharmaceutical patent cases, and that she had only limited experience taking depositions and no experience arguing motions or appeals. (See Pl. Decl. PP 65-66; Chettih Dep. 66-67.) Plaintiff also declared that she observed that Ms. Kim spent most of her time on lower - level litigation tasks such as document review [*44] and legal research. (See Pl. Decl. P 65.) In contrast, Plaintiff alleges that she engaged in higher-level legal work, including brief - writing and oral argument. (See, e.g., Pl. Decl. PP 118, 130, 139.) Considering these allegations in the light most favorable to Plaintiff, a reasonable jury could find that Ms. Kim and Ms. Chettih were not similarly situated to Plaintiff, because (1) they were not performing the

of discrimination in the allocation of work, and (2) the Court's conclusion that a reasonable jury could find that CPLP's proffered reasons for failing to assign her adequate work are false. See Zimmermann v. Assocs. First Capital Corp., 251 F.3d 376, 381 (2d Cir. 2001). "Proof that the defendant's explanation is unworthy of credence is . . . one form of circumstantial evidence that is probative of intentional discrimination, [*45] and it may be quite persuasive." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). Pavane's comments to Plaintiff and his failure to investigate her discrimination claim strengthen the inference that the proffered explanation masks discriminatory animus.

Accordingly, the Court denies Defendant summary judgment with respect to Plaintiff's work assignment claim.

b. Promotion Claim

Plaintiff claims that CPLP discriminated against her by failing to promote her to partner in 2002 and 2003.³² Defendant seeks summary judgment with respect to this claim.³³ The Court concludes that Plaintiff has submitted sufficient evidence to survive summary judgment.

i. Prima Facie Case

a. Qualification for Promotion

Plaintiff presents evidence that she possessed the basic skills necessary [*47] for promotion to partner. See

Slattery, 248 F.3d at 92. It is undisputed that Plaintiff originated business for CPLP (see Def. Ctr. 56.1 P 5-6), and Plaintiff alleges that she received a positive review of her work during her October 2002 performance evaluation (see Pl. Decl. P 68). Moreover, Plaintiff alleges that during her initial interview for the associate position, the then-managing partner, Cohen, represented that Plaintiff would have the opportunity to be considered for promotion. (See Pl. Decl. P 15.) This statement suggests that Plaintiff possessed the basic qualifications for promotion.³⁴ This evidence satisfies the qualification element of Plaintiff's prima facie case.

b. Adverse Employment Action

It is well-established that a failure to promote constitutes an adverse employment action. See Demoret v. Zegarelli, 451 F.3d 140, 151 (2d Cir. 2006); Mauro v. S. New England Telecomms., Inc., 208 F.3d 384, 386 (2d Cir. 2000). It is undisputed that CPLP [*48] never promoted Plaintiff. Accordingly, the Court concludes that Plaintiff satisfies this element of her prima facie case.

c. Inference of Discrimination

Plaintiff submits evidence supporting an inference that CPLP did not promote her due to discrimination. First, as discussed in Part II.C.2.a, a reasonable jury could find that CPLP discriminated against Plaintiff in work assignments. Because the partners who allegedly discriminated against Plaintiff in the assignment of work also participated in promotion decisions, CPLP's failure

same kind of legal work as Plaintiff and therefore would be given different assignments; and (2) Plaintiff's more senior status may have led her to hit a "glass ceiling" that did not affect Ms. Kim and Ms. Chettih.

³² Plaintiff presents evidence that CPLP decided not to promote her in August or September 2003, prior to her termination on September 18, 2003. (See Pl. Decl. P 136; Pl. Ex. CC.) Additional factual development is required to determine whether this alleged failure to promote Plaintiff provides a basis for a claim. As discussed infra Part II.C.2.c, if CPLP's promotion decision never took effect, it cannot form the basis of a claim. However, it is not apparent from the facts before the Court whether CPLP promotions take effect [*46] at the time a decision is made, or whether they take effect at the start of the October salary cycle. Interpreting the facts in the light most favorable to Plaintiff, the Court assumes that CPLP's 2003 promotion decision took effect immediately, and therefore provides the basis for a claim.

³³ The Court notes that in order to allege a Title VII claim for failure to promote, Plaintiff must have applied for a promotion to partner and been rejected. See Brown v. Coach Stores, Inc., 163 F.3d 706, 710 (2d Cir. 1998). Defendant does not argue that Plaintiff failed to apply for a promotion, and Plaintiff has submitted evidence that she repeatedly requested that CPLP consider her for partnership. The Court therefore concludes that Plaintiff meets the application requirement. See Williams v. R.H. Donnelley, Corp., 368 F.3d 123, 129 (2d Cir. 2004) ("[W]e have held that if an employee expresses to the employer an interest in promotion to a particular class of positions, that general expression of interest may satisfy the requirement that the employee apply for the position.").

³⁴ The Court notes that a technical degree is not required for promotion to partner. Plaintiff alleges that Mr. Alper ("Alper"), who was promoted to partner at CPLP after two years, lacked a technical degree. (See Alper Dep. 11.)

to promote Plaintiff supports an inference of discrimination as well. See Vargas v. Chubb Group of Ins. Cos., No. 99 Civ. 4916, 2002 U.S. Dist. LEXIS 18438, 2002 WL 31175233, at *7 (S.D.N.Y. Sept. 30, 2002) (finding that a plaintiff's "evidence as to the circumstances under which she was denied [one] position [wa]s itself sufficient to create an inference of discrimination [with respect to a second position]"). Second, CPLP promoted three male associates to partner during Plaintiff's employment.³⁵ "[An] inference [of discrimination] can be established if the Plaintiff shows that the position sought went to a person outside h[er] protected class." Mitchell v. N. Westchester Hosp., 171 F. Supp. 2d 274, 278 (S.D.N.Y. 2001). [*49]³⁶ Finally, as discussed in Part II.C.2.a, Pavane made comments to Plaintiff that could be interpreted as reflecting discriminatory animus, and failed to investigate Plaintiff's October 2001 discrimination complaint. Together, these allegations are sufficient to establish that CPLP's failure to promote Plaintiff occurred under circumstances giving rise to an inference of discrimination.³⁷

Accordingly, Plaintiff satisfies the final element of her prima facie case, and thereby establishes a prima facie case of discrimination with respect to her failure to promote claim.

ii. Defendant's Non-Discriminatory Reasons

Defendant asserts that it did not promote Plaintiff to partner because she was less qualified than the three male associates who were promoted during her tenure (the "three associates"). CPLP alleges that (1) the three associates had better records of performance than Plaintiff; (2) the three associates got along with the CPLP partners, associates, and staff while Plaintiff did not; (3) unlike Plaintiff, the three associates were educated in the United States and possessed technical degrees; (4) unlike Plaintiff, the three associates were admitted to the U.S. Patent and Trademark Office; and

(5) the three associates generated more business than Plaintiff. Defendant also asserts that Plaintiff had inconsistent work quality, low billable hours, and a record of unprofessional interactions [*51] and personality conflicts with CPLP partners, associates, and staff.

The Court notes that Defendant's 56.1 Statement and Response to Plaintiff's Counter 56.1 Statement cites no evidence regarding the work performance of the three associates promoted to partner, or their relationships with CPLP partners, associates, and staff. (See, e.g., Def. Ctr. 56.1 Stat. PP 5-6.) Thus, Defendant did not satisfy its burden of producing evidence that CPLP did not promote Plaintiff because other associates (1) had better records of work performance, and (2) got along with CPLP partners, associates, and staff. See St. Mary's Honor Ctr., 509 U.S. at 507. Accordingly, these assertions do not establish a non-discriminatory explanation for CPLP's failure to promote Plaintiff.

However, Defendant's remaining allegations are supported by evidence and constitute legitimate, non-discriminatory reasons for CPLP's failure to promote Plaintiff. Thus, Defendant has met its burden under the second stage of the McDonnell Douglas framework, and the Court must determine whether a reasonable jury could conclude that CPLP's explanation is a pretext for discrimination.

iii. Pretext

The Court concludes that Plaintiff presents [*52] sufficient evidence of pretext to survive summary judgment. Although Defendant submits evidence that the three associates who were promoted had superior performance to Plaintiff on some metrics, such as business generation, this evidence is not dispositive. Defendant does not allege that CPLP had only a fixed number of partner positions available for associates seeking promotion. Thus, the question before the Court is whether a reasonable jury could find that Plaintiff was

³⁵ CPLP did not promote any female associates to partner during Plaintiff's employment.

³⁶ Defendant argues that these male associates were not similarly situated to Plaintiff, but this argument raises a question of fact for the jury. See Graham, 230 F.3d at 39.

³⁷ Defendant incorrectly argues that Plaintiff must show that "her qualifications were so superior to the persons selected that no reasonable person could have chosen the candidates selected over her but for gender bias." (Def. Mem. at 15.) This standard applies only if "a plaintiff seeks to prevent summary judgment [solely] on the strength of a discrepancy in qualifications ignored by an employer." Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 103 (2d Cir. 2001). Plaintiff presents other evidence of discrimination, including remarks that [*50] may be construed as reflecting discriminatory animus, and evidence that CPLP partners discriminated against her in the allocation of work. Accordingly, Byrnie's standard is inapplicable.

also qualified for promotion and that she would have received a promotion absent discrimination. The Court concludes that there is a genuine issue of material fact with respect to this question.

First, Plaintiff's evidence draws into question CPLP's claim that it did not promote Plaintiff in part due to her educational background and lack of a technical degree. For example, Plaintiff alleges that when she first interviewed at CPLP, Cohen, the then-managing partner, informed her that CPLP would afford her the opportunity to be considered for promotion to partner. (See PI. Decl. P 15.) Plaintiff discussed her educational and work background with Cohen, and he did not inform her that her background would pose an obstacle [*53] to promotion. It is also undisputed that Alper, who was promoted to partner in 1996, did not have a technical background and was not admitted to the U.S. Patent and Trademark Office. (See Alper Dep. 11.) Finally, there is a factual dispute regarding CPLP's principal areas of practice. See *supra* Part II.C.2.a.iii. This dispute raises a factual question regarding the relevance of a technical background and admission to the USPTO to CPLP's practice.

Second, Plaintiff draws into question whether CPLP considered business generation relevant to promotion. Plaintiff alleges that when she interviewed for her position, Alper informed her that business origination affects compensation, but not eligibility for promotion to partner. He also allegedly told Plaintiff that he had not originated any business before his promotion to partner. (See PI. Decl. P 16.) These allegations suggest that CPLP's reliance on Plaintiff's business generation is pretextual.

Third, as discussed in Part II.C.2.a.iii, Defendant's assertion that Plaintiff had inconsistent work performance and personality conflicts with partners, associates, and staff requires a credibility determination that is properly made by a jury.³⁸ [*54]

Thus, Plaintiff has produced evidence that CPLP's explanations for not promoting Plaintiff are unworthy of credence. Coupled with Plaintiff's *prima facie* case, including her evidence that CPLP discriminated against her in the allocation of work, the Court concludes that a

reasonable jury could find that Defendant's explanations are a pretext for discrimination. See *James v. New York Racing Ass'n*, 233 F.3d 149, 156 (2d Cir. 2000); *Ramos*, 134 F. Supp. 2d at 345. Accordingly, the Court denies Defendant summary judgment on this claim.

c. 2003 Salary Claim

Although CPLP terminated Plaintiff before the start of the October 2003-September 2004 salary cycle, Plaintiff presents evidence that CPLP had previously decided not to raise her salary for this upcoming period. [*55] (See PI. Opp'n 8-9; PI. Ex. CC.) Plaintiff argues that the Court should consider this 2003 salary decision as the basis for an additional discrimination claim. The Court concludes that the 2003 salary decision does not provide a basis for a claim, because the decision never took effect.

CPLP fired Plaintiff in September 2003, before the beginning of the October 2003 salary cycle. Because CPLP's salary decision was never implemented with respect to Plaintiff, Plaintiff was never subject to any "materially adverse change in the terms and conditions of [her] employment," as required under the first stage of the *McDonnell Douglas* framework. See *Weeks*, 273 F.3d at 85. Accordingly, CPLP's 2003 salary decision cannot form the basis of a discrimination claim. See *Cheshire v. Paulson*, No. 04 Civ. 3884, 2007 U.S. Dist. LEXIS 42633, 2007 WL 1703180, at *5 (E.D.N.Y. June 12, 2007) (holding that "absent without leave" charges against a plaintiff did not constitute an adverse employment action under the Americans with Disabilities Act because, although these charges formed "the basis for later disciplinary action . . . , those actions never took effect"). The Court therefore grants Defendant summary judgment with respect to [*56] Plaintiff's 2003 salary claim.

d. Termination Claim

Plaintiff claims that CPLP discriminated against her by terminating her employment in September 2003. Defendant seeks summary judgment with respect to this termination claim. Because Plaintiff fails to establish that her termination raises a discrimination claim independent of her retaliation claim, the Court grants Defendant summary judgment.

³⁸ Defendant also asserts that it did not promote Plaintiff due to her failure to meet its billable hour requirement. However, as discussed in Part II.C.2.a, Plaintiff presented evidence that her failure to meet the billable hour requirement was due to discrimination. A reasonable jury could find that this alleged discriminatory treatment draws into question CPLP's reliance on Plaintiff's billable hours in its promotion decision.

Plaintiff argues that CPLP terminated her because of her September 16, 2003 email complaining of sex discrimination. (See Pl. Opp. 17-19.) Plaintiff's evidence in support of her discrimination claim is therefore not "distinguishable from the evidence that supports h[er] claim for retaliatory discharge." See *Henderson v. Ctr. for Cmty. Alternatives*, 911 F. Supp. 689, 705-07 (S.D.N.Y. 1996). Accordingly, the Court concludes that Plaintiff has not alleged a claim of discriminatory discharge separate from her claim of retaliatory discharge. Summary judgment on her discrimination claim is therefore warranted.³⁹ See *id.*

e. Conclusion

The Court therefore grants Defendant summary judgment with respect to Plaintiff's (1) 2003 salary claim; and (2) discriminatory termination claim. The Court denies Defendant summary judgment with respect to Plaintiff's (1) work assignment claim; and (2) 2002 and 2003 promotion claims.

D. Retaliation Claim

Plaintiff alleges that Defendant retaliated against her for her September 16, 2003 email complaining about gender discrimination at CPLP.⁴⁰ Defendant seeks summary judgment with respect to this retaliation [*58] claim. The Court concludes that a reasonable jury could find that CPLP retaliated against Plaintiff for her email. Accordingly, the Court denies Defendant summary judgment on this claim.

1. Legal Standard

Title VII prohibits an employer from "discriminat[ing] against any of [its] employees . . . because [the

employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). Retaliation claims brought pursuant to Title VII are evaluated under a three-step burden-shifting analysis, which follows the *McDonnell Douglas* framework. See *Jute*, 420 F.3d at 173; *Terry v. Ashcroft*, 336 F.3d 128, 141 (2d Cir. 2003).

Plaintiff must first establish a *prima facie* case of retaliation, by showing: "(1) participation in a protected activity; (2) that the defendant knew of the protected [*59] activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action." *Jute*, 420 F.3d at 173 (quoting *McMenemy v. City of Rochester*, 241 F.3d 279, 282-83 (2d Cir. 2001)). Establishing a *prima facie* case gives rise to a presumption of retaliation, at which point "the onus falls on the employer to articulate a legitimate, non-retaliatory reason for the adverse employment action." *Id.* Once the employer offers such a reason, "the presumption of retaliation dissipates," and the plaintiff must show that the proffered given is pretextual, and that "retaliation was a substantial reason for the adverse employment action." *Id.* at 173, 180.

2. Analysis

Plaintiff alleges that she was terminated in retaliation for a September 16, 2003 email that she sent to the CPLP partners. The email included a link to an article about female lawyers' participation in patent trials. (Pl. Ex. JJ.)⁴¹ Plaintiff's email stated that

CPLP is undoubtedly behind the times. All the women litigators in this firm, regardless of their

³⁹ CPLP's alleged discrimination against Plaintiff regarding work assignments and promotions constitutes minimal evidence of discriminatory intent in her firing. However, Plaintiff does [*57] not argue that these incidents are sufficient to support an inference of discrimination regarding her termination, and the Court concludes that no reasonable jury could find such an inference. Significantly, Plaintiff provides no examples of similarly situated employees who were treated differently after engaging in similar conduct. See *Graham*, 230 F.3d at 40. Furthermore, Plaintiff's evidence indicates that CPLP made salary and promotion decisions regarding Plaintiff for the October 2003 cycle just a few weeks before her termination. (See Pl. Decl. P 136.) This chronology weakens any inference that her termination related to events preceding Plaintiff's September 2003 emails.

⁴⁰ CPLP's alleged retaliation for Plaintiff's September 16, 2003 email is the only retaliation claim specifically mentioned in the Complaint or discussed in Plaintiff's Opposition brief. Accordingly, although Plaintiff's Declaration characterizes additional actions by Defendant as retaliatory, the Court will not consider them.

⁴¹ Plaintiff's email described the article as "deal[ing] with the fact that there are still very few women who are first or second chair in patent trials, but that law firms who have substantial patent litigation practices are now waking up to the fact that it is no longer in their best interests not to have women litigators who have sufficient experience to be at least second chair at trial." (Pl. Ex. JJ.)

level of experience or talent, have been relegated to non-partnership track support roles, thus limiting their career development [*60] as well as their ability to undertake substantive trial work. I question whether this is really in the long term best interests of the firm's litigation practice

(*Id.*) CPLP fired Plaintiff two days later, on September 18, 2003.

1. Prima Facie Case

Plaintiff establishes a prima facie case of retaliation.

a. Protected Activity

Considering the evidence in the light most favorable to Plaintiff, the Court finds that Plaintiff's email to the CPLP partners constitutes a protected activity. A protected activity consists of an "action taken to protest or oppose statutorily prohibited discrimination." *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 566 (2d Cir. 2000). "[T]he law is clear that opposition to a Title VII violation need not rise to the level of a formal complaint in order to receive [*61] statutory protection," and that "making complaints to management" constitutes a protected activity. *Id.* (internal quotation marks and citation omitted). Furthermore, "[a] plaintiff need not establish that the conduct she opposed was actually a violation of Title VII, but only that she possessed a 'good faith, reasonable belief that the underlying employment practice was unlawful' under that statute." *Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 292 (2d Cir. 1998) (internal citation omitted).

Plaintiff's email was a complaint to CPLP partners about the treatment of female litigation associates. Because Plaintiff's email specifically complained about CPLP's treatment of female associates, the Court concludes that the email constitutes a "report and protest [of] workplace discrimination." *Lyte v. S. Cent. Conn. Reg'l Water Auth.*, 482 F. Supp. 2d 252, 268-69 (D. Conn. 2007); cf. *Moncrief v. N.Y. Pub. Library, No. 05 Civ. 2164*, 2007 U.S. Dist. LEXIS 61449, 2007 WL 2398808, at *6 (S.D.N.Y. Aug. 17, 2007) (granting summary judgment when the alleged complaint was "bereft of any talk about discrimination at all and thus can not be deemed a protected activity."). The Court also concludes

that a reasonable [*62] jury could find that Plaintiff possessed a good faith and reasonable belief that CPLP's activities violated Title VII. A reasonable jury could find that Plaintiff's belief was held in good faith if it credits her testimony regarding her perception of CPLP's practices. A reasonable jury could conclude that Plaintiff's belief was reasonable if, for example, it credits evidence that she was discriminated against in promotions and the distribution of work. Thus, the Court concludes that Plaintiff establishes that she engaged in a protected activity.⁴²

b. Defendant's Knowledge of the Protected Activity

It is undisputed that CPLP knew about Plaintiff's email. Plaintiff sent the email to all CPLP partners. On September 17, 2003, prior to Plaintiff's termination, Pavane forwarded Plaintiff's email to CPLP's office manager, with a note that the email should be placed [*63] in Plaintiff's file. (See Pl. Ex. KK.) Thus, Plaintiff establishes the second element of her prima facie case.

c. Adverse Employment Action

It is undisputed that Plaintiff suffered an adverse employment action, because CPLP terminated Plaintiff on September 18, 2003.

d. Causal Connection

Plaintiff establishes a causal connection between her email complaining about discrimination and her termination. "Causation can be established either indirectly by means of circumstantial evidence, for example, by showing that the protected activity was followed by adverse treatment in employment, or directly by evidence of retaliatory animus." *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999). Plaintiff provides both circumstantial and direct evidence of retaliation.

First, the fact that CPLP fired Plaintiff less than two days after she complained about sex discrimination is strong circumstantial evidence of retaliation. See *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 554 (2d Cir. 2001) ("In this circuit, a plaintiff can indirectly establish a causal connection . . . by showing that the protected activity was closely followed in time by the adverse [employment] action.").

Second, Plaintiff [*64] submitted direct evidence that Pavane, the CPLP managing partner who participated

⁴² Defendant argues that Plaintiff fails to satisfy this element of her prima facie case because "forwarding a magazine article" does not constitute a protected activity. (See Def. Mem. 19.) This argument misrepresents Plaintiff's email. Plaintiff's email not only forwarded an article, but also directly criticized CPLP's practices.

in Plaintiff's termination, held retaliatory animus toward Plaintiff. During his deposition, Pavane testified that he thought Plaintiff's email was "obnoxious," that he was "angered" by it, that it was "just a ranting of somebody who is looking to set you up for a litigation," and that she was "trying to piss everybody off." (Pavane Dep. 189-91.) A reasonable jury could find that these statements show that Pavane wanted to retaliate against Plaintiff for her complaint. Thus, Plaintiff establishes a causal connection between her September 16, 2003 email and her termination.

2. Defendant's Non-Retaliatory Reason

Because Plaintiff establishes a prima facie case of discrimination, the burden shifts to CPLP to provide a non-retaliatory reason for Plaintiff's termination. CPLP meets this burden. CPLP asserts that it terminated Plaintiff in response to a series of emails she wrote to the partners and staff on September 18, 2003, which CPLP characterizes as "insulting and unprofessional." (See Def. 56.1 P 13.) CPLP characterizes these September 18, 2003 emails as the "final straw" in its decision to terminate Plaintiff, [*65] and presents evidence that Plaintiff had a long history of poor performance at CPLP. (See Def. 56.1 P 12; see also Meiri v. Dacon, 759 F.2d 989, 997 (2d Cir. 1985).) Accordingly, CPLP's explanation constitutes a legitimate non-retaliatory reason for Plaintiff's termination, and the burden shifts to Plaintiff to present evidence that this reason is pretextual.

3. Pretext

The Court concludes that Plaintiff presents sufficient evidence that Defendant's explanation is pretext for discrimination.

First, Plaintiff points out inconsistencies between contemporaneous emails regarding Plaintiff's termination sent by the CPLP partners and deposition testimony by Pavane and Alper. A reasonable jury could find that these inconsistencies draw into question CPLP's non-retaliatory explanation for Plaintiff's firing. For example, Alper testified at his deposition that he had been "very reluctant" to terminate Plaintiff until she sent a 3:01 p.m. email to the paralegals on September

18, 2003. (Alper Dep. 125.) However, the email record indicates that Alper argued that Plaintiff should be fired in a 12:58 p.m. email on that same date. Likewise, Pavane testified that he had not been in the "let's fire [Plaintiff] [*66] camp" until after she sent the 3:01 p.m. email to the paralegals. (Pavane Dep. 170.) However, the email record indicates that Pavane concurred with Alper's suggestion to fire Plaintiff in a 1:00 p.m. email, two hours prior to Plaintiff's email to the paralegals.⁴³ These inconsistencies could support a finding that CPLP's reasons for firing Plaintiff were pretextual. See Aneja v. M.A. Angeliades, Inc., No. 05 Civ. 9678, 2008 U.S. Dist. LEXIS 30602, 2008 WL 918704, at *7 (S.D.N.Y. Mar. 31, 2008) ("A jury issue on the question of pretext may be created when an employer offers inconsistent and varying explanations for its decision to terminate a plaintiff.").

Second, a reasonable jury could find that the evidence of a causal [*67] connection set forth in Plaintiff's prima facie case, including Pavane's deposition testimony expressing hostility towards Plaintiff's September 16, 2003 discrimination complaint, establishes that the real reason for Plaintiff's termination was retaliation.

Accordingly, the Court concludes that summary judgment is inappropriate with respect to Plaintiff's retaliation claim.

IV. Conclusion

For the reasons stated above, Defendant's motion for partial summary judgment is granted in part and denied in part. (D.E. 30.) The following claims remain for trial: (1) Plaintiff's work assignment claim under Title VII and state and city law; (2) Plaintiff's 2002 promotion claim under state and city law; (3) Plaintiff's 2003 promotion claim under Title VII and state and state and city law; and (5) Plaintiff's contract claim. No later than August 16, 2008, the parties shall submit a joint pre-trial order. The pre-trial order shall conform to the Court's Individual Practices, a copy of which may be obtained from http://www1.nysd.uscourts.gov/judge_info.php?id=35.

⁴³ Defendant argues that these inconsistencies are due to the three year gap between the email exchange and the depositions, and because Pavane and Alper did not review the email exchange prior to their depositions. (See Def. Ctr. 56.1 PP 14-15.) CPLP further asserts that the entire sequence of events on September 18, 2003 led to Plaintiff's termination. (Id.) Defendant's explanation for these inconsistencies requires credibility determinations that are inappropriate at the summary judgment stage.

2008 U.S. Dist. LEXIS 58047, *67

This case is deemed Ready for Trial August 16, 2008.⁴⁴ /s/ Kimba M. Wood

SO ORDERED

Kimba M. Wood

Dated: New York, New York

July 30, 2008

United States District Judge

⁴⁴ At any time after the Ready Trial Date, the Court may call the parties to trial upon [*68] forty-eight hours notice. No adjournment of that trial date will be permitted, unless counsel has faxed to chambers an affidavit stating that he or she is engaged in trial in another court. This affidavit shall include: (1) the caption of the other case, including its index number; (2) the expected length of the trial; (3) the court in which the other case is to be tried; and (4) the name and telephone number of the judge presiding over the case. Counsel shall notify the Court and all other counsel in writing, at the earliest possible time, of any particular scheduling problems involving out-of-town witnesses or other exigencies.



Caution

As of: October 14, 2014 1:41 PM EDT

Daugherty v. Sajar Plastics, Inc.

United States Court of Appeals for the Sixth Circuit

September 17, 2007, Argued; October 16, 2008, Decided; October 16, 2008, Filed

File Name: 08a0379p.06

No. 06-4608

Reporter

544 F.3d 696; 2008 U.S. App. LEXIS 21574; 2008 FED App. 0379P (6th Cir.); 156 Lab. Cas. (CCH) P35,490; 91 Empl. Prac. Dec. (CCH) P43,358; 21 Am. Disabilities Cas. (BNA) 200; 14 Wage & Hour Cas. 2d (BNA) 231; 13 Accom. Disabilities Dec. (CCH) P13-167

JAMES DAUGHERTY, Plaintiff-Appellant, v. SAJAR PLASTICS, INC, Defendant-Appellee.

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 05-02787--Patricia A. Gaughan, District Judge.

Daugherty v. Sajar Plastics, Inc., 2006 U.S. Dist. LEXIS 83976 (N.D. Ohio, Nov. 6, 2006)

LexisNexis® Headnotes

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN1 An appellate court reviews de novo the district court's order granting summary judgment.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2 Summary judgment is warranted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

Civil Procedure > ... > Summary Judgment > Evidentiary Considerations > Absence of Essential Element

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN3 In evaluating summary judgment, a court must view all the facts and the inferences drawn from it in the light most favorable to the nonmoving party. The mere existence of some alleged factual dispute between the

parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Only disputed material facts, those that might affect the outcome of the suit under the governing law, will preclude summary judgment. The function of the court in assessing a summary judgment motion is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. Entry of summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Labor & Employment Law > Discrimination > Disability Discrimination > Federal & State Interrelationships

HN4 In light of the fact that Ohio's disability discrimination law parallels the Americans with Disabilities Act (ADA), *42 U.S.C.S. § 12101 et seq.*, in all relevant respects, a court applies the same analytical framework, using cases and regulations interpreting the ADA as guidance in interpretation of the Ohio Civil Rights Act.

Labor & Employment Law > ... > Disability Discrimination > Scope & Definitions > General Overview

Labor & Employment Law > ... > Evidence > Burdens of Proof > Employee Burdens of Proof

HN5 The Americans with Disabilities Act (ADA), *42 U.S.C.S. § 12101 et seq.*, prohibits discrimination by a covered entity against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation job training, and other terms, conditions, and privileges of employment. *42 U.S.C.S. § 12112(a)*.

A prima facie case of disability discrimination under the ADA requires that a plaintiff show: (1) he or she is disabled; (2) otherwise qualified for the position, with or without reasonable accommodation; (3) suffered an adverse employment decision; (4) the employer knew or had reason to know of the plaintiff's disability; and (5) the position remained open while the employer sought other applicants or the disabled individual was replaced.

Labor & Employment Law > ... > Disability Discrimination > Scope & Definitions > General Overview

HN6 The Ohio Civil Rights Act prohibits any employer, because of the disability of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment. Ohio Rev. Code Ann. § 4112.02.

Labor & Employment Law > ... > Evidence > Burdens of Proof > Burden Shifting

HN7 Where a plaintiff seeks to establish a prima facie case by means of circumstantial evidence, courts apply the burden-shifting framework of McDonnell Douglas. The plaintiff's burden at the summary judgment stage is merely to present evidence from which a reasonable jury could conclude that the plaintiff suffered an adverse employment action under circumstances which give rise to an inference of unlawful discrimination. There are various context-dependent ways by which plaintiffs may establish a prima facie case, and not rigid requirements that all plaintiffs with similar claims must meet regardless of context.

Labor & Employment Law > ... > Scope & Definitions > Disabilities Under ADA > General Overview

HN8 It is well settled that not every physical or mental impairment constitutes a disability under the specific parameters of the Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12101 et seq. The ADA defines a "disability" as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such an individual; (B) a record of such impairment; or (C) being regarded as having such an impairment. 42 U.S.C.S. § 12102(2)(A)-(C). Ohio Rev. Code Ann. § 4112.01(A)(13) states that if an employee's condition does not meet one of these categories even if he was terminated because of some medical condition, he is not disabled within the meaning of the Act. The ADA is not a general protection for medically afflicted persons.

Labor & Employment Law > ... > Scope & Definitions > Disabilities Under ADA > Regarded With Impairments

HN9 The regarded-as-disabled prong of the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq., protects employees who are perfectly able to perform a job, but are rejected because of the myths, fears and stereotypes associated with disabilities. Individuals may be regarded as disabled when (1) an employer mistakenly believes that an employee has a physical impairment that substantially limits one or more major life activities, or (2) an employer mistakenly believes that an actual, nonlimiting impairment substantially limits one or more of an employee's major life activities. In either case, it is necessary to show that the employer entertains misperceptions about the employee.

Labor & Employment Law > ... > Disabilities Under ADA > Mental & Physical Impairments > Major Life Activities

HN12 "Major life activities" include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). These activities share the quality of being of central importance to daily life.

Labor & Employment Law > ... > Scope & Definitions > Disabilities Under ADA > Regarded With Impairments

Labor & Employment Law > ... > Evidence > Burdens of Proof > Employee Burdens of Proof

HN10 Proving a claim that the employer regarded an employee as substantially limited in the major life activity of working takes a plaintiff to the farthest reaches of the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq., and is a question imbedded almost entirely in the employer's subjective state of mind. In addition to the unique hurdles posed by the psychological component of a regarded-as-disabled claim when the major life activity at issue is working, the statutory phrase "substantially limits" takes on special meaning in this context and imposes a stringent standard, requiring proof that the employer regarded the employee as significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. 29 C.F.R. § 1630.2(j)(3)(i). One must be precluded from more than one job, a specialized job, or a particular job of choice. Consequently, proving the case becomes extraordinarily difficult.

Labor & Employment Law > ... > Scope & Definitions > Disabilities Under ADA > Regarded With Impairments

Labor & Employment Law > ... > Evidence > Burdens of Proof > Employee Burdens of Proof

HN11 In the context of proving that an employer mistakenly regarded an employee as substantially limited in the major life activity of working, not only must a plaintiff demonstrate that an employer thought he was disabled, he must also show that the employer thought that his disability would prevent him from performing a broad class of jobs. As it is safe to assume employers do not regularly consider the panoply of other jobs their employees could perform, and certainly do not often create direct evidence of such considerations, the plaintiff's task becomes even more difficult. Yet the drafters of the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq., and its subsequent interpretive regulations clearly intend that plaintiffs who are mistakenly regarded as being unable to work have a cause of action under the statute. Whether an employee is such a plaintiff lies in the question of whether the employer regarded him as substantially limited from performing a broad class of jobs.

Labor & Employment Law > ... > Family & Medical Leaves > Scope & Definitions > General Overview

Labor & Employment Law > ... > Family & Medical Leaves > Scope & Definitions > Restoration of Benefits & Positions

HN13 Under the Family and Medical Leave Act (FMLA), 29 U.S.C.S. § 2601 et seq., a qualifying employee is entitled to up to twelve weeks of unpaid leave each year if, inter alia, the employee has a serious health condition that makes the employee unable to perform the functions of his position. 29 U.S.C.S. § 2612(a)(1)(D). When the FMLA leave period has expired, the employee must be reinstated to his position or an equivalent position in terms of pay, benefits, and other conditions of employment. 29 U.S.C.S. § 2614(a)(1). A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves--(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider. 29 U.S.C.S. § 2611(11).

Labor & Employment Law > Leaves of Absence > Family & Medical Leaves > General Overview

HN14 The U.S. Court of Appeals for the Sixth Circuit has recognized two distinct theories of recovery for violations of the Family and Medical Leave Act, 29

U.S.C.S. § 2601 et seq.: (1) the so-called "entitlement" or "interference" theory, stemming from 29 U.S.C.S. § 2615(a)(1), which provides that it shall be unlawful for any employer to interfere with, restrain, or deny the exercise or attempt to exercise, any right provided under the FMLA; and (2) the "retaliation" or "discrimination" theory arising from 29 U.S.C.S. § 2615(a)(2), which states that it shall be unlawful for any employer to discharge or in any other manner discriminate against an individual for opposing any practice made unlawful by the FMLA. Under the latter theory, the FMLA affords employees protection in the event they suffer retaliation or discrimination for exercising their rights under the FMLA. Specifically, an employer is prohibited from discriminating against employees who have used FMLA leave, nor can they use the taking of FMLA leave as a negative factor in employment actions. 29 C.F.R. § 825.220(c). This prohibition includes retaliatory discharge for taking leave. An employer's motive is an integral part of the analysis because retaliation claims impose liability on employers that act against employees specifically because those employees invoked their FMLA rights.

Labor & Employment Law > Leaves of Absence > Family & Medical Leaves > Burdens of Proof

HN15 When a retaliation claim pursuant to the Family and Medical Leave Act (FMLA), 29 U.S.C.S. § 2601 et seq., is based upon direct evidence of discrimination--i.e., that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions--a plaintiff need not proceed under the McDonnell Douglas analysis. Instead, direct evidence of discrimination does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group. The evidence must establish not only that the plaintiff's employer was predisposed to discriminate on the basis of the FMLA, but also that the employer acted on that predisposition. Finally, an employee who has presented direct evidence of improper motive does not bear the burden of disproving other possible nonretaliatory reasons for the adverse action. Rather, the burden shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision absent the impermissible motive.

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Christine T. Cossler, WALTER & HAVERFIELD, Cleveland, Ohio, for Appellee.

ON BRIEF: Richard N. Selby II, DWORKEN & BERNSTEIN, Painesville, Ohio, for Appellant.

Christine T. Cossler, Eric J. Johnson, WALTER & HAVERFIELD, Cleveland, Ohio, for Appellee.

Judges: Before: MOORE and GRIFFIN, Circuit Judges; GRAHAM, District Judge. *

Opinion by: GRIFFIN

Opinion

[*699] [***1] GRIFFIN, Circuit Judge. Plaintiff James Daugherty appeals from the district court's order granting summary judgment in favor of his former employer, defendant Sajar Plastics, Inc., on his claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213 (2000), the Ohio Civil Rights Act ("OCRA"), OHIO REV. CODE § 4112.02, and the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 et seq. For the reasons stated below, we affirm in part and reverse in part.

I.

[***2] In July 1999, James Daugherty began working for [**2] Sajar Plastics, Inc. ("Sajar") as a maintenance technician. Sajar manufactures plastic injection molding components for use in the medical and banking industries. According to the job description issued by Sajar, the general function of the maintenance technician position is to "maintain buildings and equipment in satisfactory condition and make repair[s] as necessary." The maintenance technician "performs [a] variety of crafts -- electrical, hydraulics, pneumatics, welding, pipe fitting, troubleshoots and repairs all plant equipment, performs repairs on manufacturing facilities and office areas including: plumbing, light fixtures, electrical, mechanical, etc." In addition to the use of hand and power tools, the position requires the operation of dangerous machinery such as bandsaws, milling machines, power tools, forklift trucks, welders, drill presses, and overhead cranes. The physical demands of the job require "medium to heavy strength level," "frequent standing and walking, 9-10 hours a day, 2-3 hours at a time," and "frequent stooping, bending and kneeling, and climbing, occasional work in confined, tight or awkward spaces."

Daugherty experienced a back injury sometime in the [**3] 1980's that quieted but then flared up again in 2000 and 2001, while he was working at Sajar. Daugherty's physician, Dr. Peter Franklin, prescribed increasing doses of Oxycontin and Duragesic. When Daugherty first began to take the medication, he experienced disorientation and dizziness. He received a three-month reprieve from dangerous electrical work, during which time he developed a tolerance for the medication and no longer experienced these side effects. While at Sajar, Daugherty suffered from unpredictable episodes of increased back pain that temporarily rendered him unable to perform his job duties. He requested and always was granted intermittent FMLA leave, ranging from approximately two days to two weeks.

Daugherty alleges that his supervisors at Sajar expressed frustration about his intermittent leave time and unexpected absences related to his back problem. According to Daugherty, Human Resources Director Ronald Alexander purportedly told him in October 2003 that he faced the choice of either taking disability retirement or losing his job.

In November 2003, Daugherty requested and received an FMLA leave of more significant duration: one to two months. Contemporaneously with [**4] his leave request, Daugherty presented Sajar with a note from Dr. Franklin indicating that he would be able to return to work approximately two months later, on January 5, 2004. Daugherty alleges, however, that before taking his leave, Alexander warned him that "if I took that FMLA for that period of time, there would not be a job waiting for me, when I returned." Alexander disputes this claim.

Shortly after Daugherty took this FMLA leave, Sajar experienced a layoff. Along with positions in other departments, [*700] Sajar needed to lay off one maintenance worker. Daugherty had the least seniority of the maintenance technicians, but because he was on FMLA leave, he was not laid off immediately. At the end of December 2003, however, Human Resources Manager Ranae Cozzone notified Daugherty that he would be placed on layoff status effective January 5, 2004, the day he was scheduled to return from leave. He was informed by management that he had been selected for layoff because he was lowest in seniority. Daugherty neither disputes that the layoff was legitimate nor that he was the least senior maintenance technician.

* The Honorable James L. Graham, United States District Judge for the Southern District of Ohio, sitting by designation.

In February 2004, Sajar experienced an upturn in business and thus needed to hire [**5] another maintenance technician as soon as possible because of the increased workload. Alexander directed Cozzone to recall Daugherty. Alexander made Daugherty's return to work contingent upon a physical examination by Dr. Richard Altemus, a physician used by Sajar on a routine referral basis [***3] to perform drug screenings and pre-employment and post-accident examinations.¹ On February 17, 2004, Dr. Altemus examined plaintiff and, in a letter to Cozzone written on that same day, he opined:

In summary, Mr. Daugherty appeared fit with no apparent problems pertinent to his joints or back. He had no problems with the rigors of the physical examination. However, there were current medication patches affixed to his back and several residual stains of previous patches. The patient was forthcoming with his admission of daily Oxycontin oral medication and daily Duragesic (Fentanyl) transdermal medications. Both of these medications are Class II narcotics.

In my opinion, Mr. Daugherty would be able to successfully complete the duties commensurate with the job description provided me. But, because of the significant medication taken on a daily basis (both in type and strength), I do not feel comfortable [**6] in approving this man's reemployment at this time. The analgesics may mask the symptoms of a reinjury thus exacerbating his current disease or, more importantly, the amount of medication may cause an impairment of perception or judgment which might lead to an injury to himself or others.

In his deposition, Dr. Altemus further explained that he based his recommendation on the potential side effects of Daugherty's medications, his physical impairment, and Sajar's zero-drug policy applicable to narcotics as well as illegal drugs. Dr. Altemus testified that he ascertained the risks posed by Daugherty's medications by considering dosage levels, documentation in the Physicians' Desk Reference ("PDR"), the possible interaction between the Oxycontin and Duragesic patches, and Daugherty's job description. According to

Dr. Altemus, based upon Daugherty's dosage levels, the PDR cautioned that either narcotic could impair his ability [**7] to operate heavy machinery, and further stated that individuals who combine Oxycontin and other narcotics could experience other dangerous side effects, such as profound sedation or coma. Dr. Altemus also opined that when Oxycontin is taken with other opiates, the individual may demonstrate syncope or a sudden loss of blood pressure and "you drop." Considering these factors, Dr. Altemus concluded that plaintiff was physically unable to perform those duties consistent with his job description because of "excessive [**701] medication" that "may mask symptoms and may impair judgment."

Alexander and Cozzone decided that Daugherty's medications placed Sajar at risk of liability for injury to Daugherty or his coworkers. Cozzone nonetheless called Daugherty and advised him that if he could provide documentation regarding a reduction in his medications, the company "would take a look at it." Approximately two weeks later, Daugherty supplied Sajar with a brief note from Dr. Franklin stating, "TO WHOM IT MAY CONCERN Mr. Daugherty is stable on long term opoid [sic] management for chronic pain and is able to do the same work he has been doing on this medication in recent years." The note neither addressed [**8] the amount of medication Daugherty was taking nor indicated that the dosage had been reduced.

On March 18, 2004, Daugherty called Cozzone and informed her that his physician had reduced his medication dosages. When Cozzone asked him to submit written confirmation from Dr. Franklin, Daugherty refrained from doing so upon the advice of his attorney. On March 26, 2004, Cozzone sent a letter to Daugherty advising him that Sajar needed a note from his physician on or before April 2, 2004, confirming the reduction in his medication; otherwise, "we will assume that you have no interest in returning to Sajar Plastics . . . and you will not be eligible for any immediate [***4] opens [sic] that may occur." No such note was forthcoming from plaintiff or his physician. Consequently, in a letter dated April 22, 2004, Alexander informed Daugherty that Sajar had filled a maintenance position, which had opened between April 2 and April 19, with another technician:

As of this date, we still have not seen a note from your Physician. However, on or about April

¹ Dr. Altemus was not a physician under contract with Sajar; rather, he operated a private practice in close proximity to Sajar's facility. As Alexander explained, "If we need any special attention, he's available, because he's close. It's probably more for convenience."

5, 2004 you called our offices and left a voice mail message with Ranae Cozzone and requested her to call your Doctor direct for the information which [**9] we asked you to obtain.

Please understand, this office has requested twice, that you provide us with specific information relating to your medical condition. We are not going to gather this information for you.

As [t] stands currently, this office has no information which changes your employment status. In fact, you were to supply this office with the above mentioned information on or before April 2, 2004. Here it is April 22, 2004, and you still have not provided anything to support your claim that you are able to return to work. Since our request to you for information from your Doctor, an opening has occurred during the period of April 2, 2004, and April 19, 2004. Since you did not respond to our request in a timely fashion, we filled the position. If you want to be available for the next opening, I would suggest you supply this office with the requested information.

Daugherty never supplied the requested information. In accordance with the terms of Sajar's Employee Handbook, because Daugherty did not return to work within six months of being placed on layoff status, his employment was terminated. On May 12, 2004, Daugherty filed a charge of discrimination with the Ohio Civil Rights [**10] Commission and the Equal Employment Opportunity Commission ("EEOC"). The EEOC issued a right to sue letter to Daugherty dated September 30, 2005.

On November 3, 2005, Daugherty filed a complaint in Ohio state court, alleging disability discrimination under the ADA and OCRA and retaliation under the FMLA. The case was removed to federal district court on the basis of federal question jurisdiction. Sajar thereafter moved for summary judgment on all counts pursuant to Federal Rule of Civil Procedure 56(c).

[*702] On November 6, 2006, the district court issued an opinion and order granting Sajar's motion and dismissing all claims. Daugherty v. Sajar Plastics, Inc., No. 1:05 CV 2787, 2006 U.S. Dist. LEXIS 83976, 2006 WL 3228761 (N.D. Ohio, Nov. 6, 2006). The district court concluded that Daugherty failed to adduce sufficient proof that he was either disabled or regarded

as disabled by Sajar within the meaning of the comparable provisions of the ADA and OCRA and, therefore, dismissed the state and federal disability discrimination claims. Regarding Daugherty's claim of retaliatory discharge under the FMLA, the district court "assume[d] plaintiff has presented enough evidence to show an issue of fact as to whether [a] prima facie [**11] case has been established," but concluded that Sajar asserted legitimate reasons for its adverse decisions, which Daugherty then failed to show were pretextual in nature. Daugherty, 2006 U.S. Dist. LEXIS 83976, 2006 WL 3228761 at *9. The court dismissed Daugherty's claim under the FMLA and entered judgment in favor of Sajar on all claims. Daugherty now timely appeals.

II.

HN1 We review de novo the district court's order granting summary judgment. Kleiber v. Honda of Am. Mfg., Inc., 485 F.3d 862, 868 (6th Cir. 2007). **HN2** Summary judgment is warranted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." FED R. CIV. P. 56(c). **HN3** In evaluating summary judgment, [***5] we must view all the facts and the inferences drawn from it in the light most favorable to the nonmoving party. Kleiber, 485 F.3d at 868. The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

[**12] Only disputed material facts, those "that might affect the outcome of the suit under the governing law," will preclude summary judgment. Id. at 248. The function of the court in assessing a summary judgment motion is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249. "Entry of summary judgment is appropriate 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Walton v. Ford Motor Co., 424 F.3d 481, 485 (6th Cir. 2005) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

III.

Daugherty first challenges the summary judgment entered against him on his disability discrimination claims under the ADA and the OCRA. **HN4** In light of the fact that Ohio's disability discrimination law parallels the ADA in all relevant respects, we apply the same analytical framework, using cases and regulations interpreting the ADA as guidance in our interpretation of the OCRA. Wysong v. Dow Chemical Co., 503 F.3d 441, 450 (6th Cir. 2007); City of Columbus Civil Serv. Comm'n v. McGlone, 82 Ohio St. 3d 569, 1998 Ohio 410, 697 N.E.2d 204, 206-07 (Ohio 1998). **[**13]** Our analysis of Daugherty's ADA claim also resolves his state law discrimination claim. Hedrick v. Western Reserve Care Sys., 355 F.3d 444, 452 n.4 (6th Cir. 2004).

HN5 The ADA prohibits discrimination by a covered entity "against a qualified individual with a disability because of the disability of such individual in regard to **[*703]** job application procedures, the hiring, advancement, or discharge of employees, employee compensation job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).² A prima facie case of disability discrimination under the ADA requires that a plaintiff show: "1) he or she is disabled; 2) otherwise qualified for the position, with or without reasonable accommodation; 3) suffered an adverse employment decision; 4) the employer knew or had reason to know of the plaintiff's disability; and 5) the position remained open while the employer sought other applicants or the disabled individual was replaced." Macy v. Hopkins County Sch. Bd. of Educ., 484 F.3d 357, 365 (6th Cir. 2007) (internal citation **[*704]** and quotation marks omitted).

HN7 Where a plaintiff, like Daugherty, seeks to establish a prima facie case by means of circumstantial evidence, we apply the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Id.* at 364. The plaintiff's burden at the summary judgment stage "is merely to present evidence from which a reasonable jury could conclude that the plaintiff suffered an adverse employment action under circumstances which give rise to an inference of unlawful discrimination." *Id.* There are "various context-dependent ways by which plaintiffs may establish a prima facie case, and not rigid requirements

that all plaintiffs with similar claims must meet regardless of context." *Id.* at 365 (emphasis omitted).

HN8 It is well settled that not every physical or mental impairment constitutes a disability under the specific parameters of the ADA. Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, 195, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002); Bryson v. Regis Corp., 498 F.3d 561, 575 (6th Cir. 2007). **[**15]** The ADA defines a "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of **[**6]** such an individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2)(A)-(C). See also OHIO REV. CODE § 4112.01(A)(13). "If [an employee's] condition does not meet one of these categories even if he was terminated because of some medical condition, he is not disabled within the meaning of the Act. The ADA is not a general protection for medically afflicted persons." Nese v. Julian Nordic Constr. Co., 405 F.3d 638, 641 (7th Cir. 2005).

The district court in the present case found that Daugherty failed to demonstrate adequately that he suffers from a substantially limiting, ADA-qualifying impairment, as defined by § 12102(2)(A). On appeal, Daugherty does not further pursue this issue and thus waives his claim that Sajar discriminated against him on the basis of an actual disability. Harris v. Bornhorst, 513 F.3d 503, 518 (6th Cir. 2008). Our review is therefore confined to Daugherty's contention that Sajar illegally regarded him as disabled, under the alternative definition of disability **[**16]** set forth in § 12102(2)(C).

HN9 The regarded-as-disabled prong of the ADA "protects employees who are perfectly able to perform a job, but are rejected . . . because of the myths, fears and stereotypes associated with disabilities." Gruener v. Ohio Cas. Ins. Co., 510 F.3d 661, 664 (6th Cir. 2008) (internal citations and quotation marks omitted). Individuals may be regarded as disabled when "(1) [an employer] mistakenly believes that [an employee] has a physical impairment that substantially limits one or more major life activities, or (2) [an employer] mistakenly believes that an actual, nonlimiting impairment substantially limits one or more [of an employee's] major life activities." *Id.* (quoting Sutton v. United Air

² **HN6** The OCRA similarly prohibits "any employer, because of the . . . disability . . . of any person, to discharge **[**14]** without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." OHIO REV. CODE § 4112.02.

Lines, 527 U.S. 471, 489, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999)). In either case, it is necessary to show that the employer entertains misperceptions about the employee. *Id.*

Daugherty alleges that Sajar mistakenly regarded him as substantially limited in the major life activity of working.³ We have acknowledged that **HN10** proving such a claim "takes a plaintiff to the farthest reaches of the ADA" and is a question "imbedded almost entirely in the employer's subjective state of mind." Ross v. Campbell Soup Co., 237 F.3d 701, 709 (6th Cir. 2001).

[**17] In addition to the unique hurdles posed by the psychological component of a regarded-as-disabled claim when the major life activity at issue is working, the statutory phrase "substantially limits" takes on special meaning in this context and imposes a stringent standard, requiring proof that the employer regarded the employee as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." Swanson v. Univ. of Cincinnati, 268 F.3d 307, 317 (6th Cir. 2001) (quoting 29 C.F.R. § 1630.2(i)(3)(i)). See also Sutton, 527 U.S. at 492 (citing § 1630.2(i)(3)(i) and noting that "one must be precluded from more than one job, a specialized job, or a particular job of choice."). Consequently,

proving the case becomes extraordinarily difficult. **HN11** Not only must a plaintiff demonstrate that an employer thought he was disabled, he must also show that the employer thought that his disability would prevent him from performing a broad [****18**] class of jobs. As it is safe to assume employers do not regularly consider the panoply of other jobs their employees could perform, and certainly do not often create direct evidence of such considerations, the plaintiff's task becomes even more difficult. Yet the drafters of the ADA and its subsequent interpretive regulations clearly intended that plaintiffs who are mistakenly regarded as being unable to work have a cause of action under the statute. Whether [the employee] is such a plaintiff lies

[**7] in the question of whether [the employer] regarded him as substantially limited from performing a broad class of jobs.

Ross, 237 F.3d at 709.

Daugherty submits that in the context of summary judgment, he has raised a genuine issue of material fact as to whether Sajar misperceived his back condition and related medication use as significantly restricting his ability [****19**] to perform either a class of jobs or a broad range of jobs. He argues that, despite Dr. Franklin's medical opinion that he would be fit to return to work without restrictions on or about January 5, 2004, Sajar viewed him as unable to work, as evidenced primarily by Dr. Altemus's "flawed" medical evaluation purportedly recommending that Daugherty [****20**] should not perform any job that entailed the use of heavy machinery. Daugherty, however, misconstrues the substance of Dr. Altemus's evaluation, and we are not persuaded that the evidence raises a genuine issue of material fact in terms of the relevant *Ross* inquiry.

Dr. Altemus did not, as Daugherty claims, express the viewpoint that Daugherty was significantly restricted in his ability to perform a broad range of jobs. Rather, Dr. Altemus concluded, based upon plaintiff's daily dosage of OxyContin and Fentanyl and the possible dangerous side effects of these drugs cited in the PDR, that there was a high risk of impairment and ensuing injury while operating the dangerous machinery that was an integral function of Sajar's maintenance technician position. In his February 17, 2004, letter to Sajar, Dr. Altemus opined that "Mr. Daugherty would be [****20**] able to successfully complete *the duties commensurate with the job description* provided me. But, because of the significant medication taken on a daily basis (both in type and strength), I do not feel comfortable in approving this man's reemployment at this time." (Emphasis added.) The letter indicates that, based upon his concerns about the risk of impairment that Daugherty's medication levels posed with respect to operating dangerous machinery, Dr. Altemus viewed plaintiff as being unfit to perform the essential functions of one particular job -- maintenance technician at Sajar. Dr. Altemus's deposition testimony likewise reflects that he did not consider Daugherty to be broadly unsuited for other positions beyond that of maintenance technician for Sajar:

³ **HN12** "Major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). These activities share the quality of being "of central importance to daily life." Bryson, 498 F.3d at 575 (quoting Williams, 534 U.S. at 196).

Q. So would it be accurate to say that you concluded that somebody who was taking this level of medications would, per se, be unable to perform *this particular job*

A. No, that's not the gist of this at all. The gist is that he could do the job; however there is no way to tell what the next day would be. He does not have to give you all or nothing. You don't know when your perception is going to be off-base.

Q. So would it be safe to [**21] say that anybody who is taking these medications, you would exclude from *this job* because of that?

A. Absolutely. And it wouldn't even have to be these medications.

(Emphasis added.) In response to questions from plaintiff's counsel, Dr. Altemus further explained:

Q. What aspect of the job did you feel prevented him from being able to safely perform it?

A. The fact that his job description says that he has to work with power tools, milling machines, forklift truck[s], bandsaws, welders, drill press, and overhead cranes. Any one of those can kill you.

[**8] Q. So eliminating those would have made it acceptable for him to continue in the job?

A. I don't know. It would depend on what the description would be of his job, if you eliminated all those.

As this testimony makes clear, Dr. Altemus assessed Daugherty's medical condition and capabilities only within the boundaries of the job description pertaining to Sajar's maintenance technician position.

Independent of Dr. Altemus's medical evaluation, which does not substantiate Daugherty's contention that the doctor found him to be substantially limited in the major life activity of working, there is no evidence that Sajar's decisionmakers who interacted [**22] directly with plaintiff -- namely, Alexander and Cozzone -- believed that he was unable to undertake a broad class or range of jobs due to his back condition. From his own perspective, Alexander, who [**706] had the ultimate authority to terminate plaintiff's employment, testified

that "[t]he way I interpreted [Dr. Altemus's opinion] was the medication he was taking was making him unsuitable for employment, *doing and performing the function of his job.*" (Emphasis added.) Both Alexander and Cozzone informed Daugherty that if his medication levels were reduced or the medication eliminated completely, Sajar would consider recalling him for the next available maintenance technician position. They therefore asked for documentation from Daugherty's physician confirming either a reduction in dosage or elimination of these narcotics altogether, but Daugherty failed to comply with Sajar's request, despite indicating in his March 18, 2004, statement to Cozzone that Dr. Franklin had already reduced the doses.

In sum, the evidence shows, at most, that Sajar believed that Daugherty's back condition and current medication levels precluded him from performing the dangerous machinery functions required of [**23] the particular job of maintenance technician at Sajar, but did not regard him as unable to perform a broad class or range of jobs in the maintenance field or other categories of employment. Such evidence does not suffice to establish a prima facie regarded-as-disabled discrimination claim under the ADA and OCRA that implicates the major life activity of working. Sutton, 527 U.S. at 492; see also Schuler v. SuperValu, Inc., 336 F.3d 702, 705 (8th Cir. 2003) (affirming dismissal of ADA regarded-as-disabled claim brought by prospective employee with epilepsy where evidence showed that defendant employer "determined only that [the plaintiff] is precluded from performing the functions necessary to a specific job in its warehouse," but there was "no evidence to suggest that [the defendant] viewed [the plaintiff] as unable to perform other manual labor positions or even other warehouse positions."); EEOC v. J.B. Hunt Transp., Inc., 321 F.3d 69, 76 (2d Cir. 2003) (affirming summary judgment as to regarded-as-disabled claim under the ADA where the defendant employer refused to hire certain applicants for over-the-road truck driving positions because they used a category of medications known [**24] to have side effects that might impair driving ability, and the record "only shows that [the defendant] saw the applicants as unfit to perform a job for which they were seeking applicants: long-distance, freight-carrying, tractor-trailer driving," and not a class or broad range of other truck driving jobs.).

We therefore affirm the district court's order granting summary judgment in favor of Sajar with regard to Daugherty's state and federal disability discrimination

claims, in light of Daugherty's failure to demonstrate adequately that Sajar regarded him as disabled from the major life activity of working.

IV.

In his second assignment of error, Daugherty argues that the district court erred in dismissing his FMLA retaliation claim. We agree.

[***9] **HN13** Under the FMLA, a qualifying employee is entitled to up to twelve weeks of unpaid leave each year if, *inter alia*, the employee has a serious health condition that makes the employee unable to perform the functions of his position. Walton, 424 F.3d at 485 (citing 29 U.S.C. § 2612(a)(1)(D)).⁴ When the FMLA leave period has expired, the employee must be [*707] reinstated to his position or an equivalent position in terms of pay, benefits, and other conditions [**25] of employment. 29 U.S.C. § 2614(a)(1).

HN14 We have recognized two distinct theories of recovery for violations of the FMLA: (1) the so-called "entitlement" or "interference" theory, stemming from 29 U.S.C. § 2615(a)(1), which provides that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise or attempt to exercise, any right provided under [the FMLA]"; and (2) the "retaliation" or "discrimination" theory arising from 29 U.S.C. § 2615(a)(2), which states that "[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against an individual for opposing any practice made unlawful by [the FMLA]." Edgar v. JAC Prods., Inc., 443 F.3d 501, 508 (6th Cir. 2006). Under the latter theory, as pleaded in this case by Daugherty,

the FMLA . . . affords employees protection in the event they suffer retaliation or discrimination for exercising their rights under [**26] the FMLA. Specifically, "[a]n employer is prohibited from discriminating against employees . . . who have used FMLA leave," nor can they "use the taking of FMLA leave as a negative factor in employment actions." 29 C.F.R. § 825.220(c). This prohibition includes retaliatory discharge for taking leave.

Arban v. West Publ'g Co., 345 F.3d 390, 403 (6th Cir. 2003).

⁴ A "serious health condition" is defined as "an illness, injury, impairment, or physical or mental condition that involves -- (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11).

An employer's motive is an integral part of the analysis "because retaliation claims impose liability on employers that act against employees specifically *because* those employees invoked their FMLA rights." Edgar, 443 F.3d at 508.

An FMLA retaliation claim based solely upon circumstantial evidence of unlawful conduct is evaluated according to the tripartite burden-shifting framework set forth in McDonnell Douglas, Bryson v. Regis Corp., 498 F.3d 561, 570 (6th Cir. 2007). A plaintiff must typically make a prima facie showing that: (1) he engaged in a statutorily protected activity; (2) he suffered an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse employment action. *Id.* However, **HN15** when such an action is based upon direct evidence of discrimination -- i.e., "that evidence [**27] which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions" -- a plaintiff need not proceed under the McDonnell Douglas analysis. DiCarlo v. Potter, 358 F.3d 408, 415 (6th Cir. 2004) (internal citation and quotation marks omitted). Instead, as we explained in DiCarlo:

[D]irect evidence of discrimination does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group. The evidence must establish not only that the plaintiff's employer was predisposed to discriminate on the basis of [the FMLA], but also that the employer acted on that predisposition. Finally, an employee who has presented direct evidence of improper motive does not bear the burden of disproving other possible nonretaliatory reasons for the adverse action. Rather, the burden shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision absent the impermissible motive.

[***10] *Id.* (internal citations and quotation marks omitted).

In the instant case, the district court analyzed Daugherty's [**28] FMLA retaliation claim pursuant to

the *McDonnell Douglas* burden-shifting framework appropriate for [*708] circumstantial evidence cases. The court "assume[d] plaintiff has presented enough evidence to show an issue of fact as to whether the prima facie case has been established," but concluded that Sajar thereafter asserted legitimate reasons for its adverse decisions, which Daugherty in turn failed to show were pretextual in nature. *Daugherty, 2006 U.S. Dist. LEXIS 83976, 2006 WL 3228761 at *9.*

Upon our review of the record, however, we conclude that the district court erred in utilizing the indirect evidence approach where there exists direct evidence of discrimination. As the district court itself acknowledged, one allegation that is central to Daugherty's FMLA retaliation claim is his contention that Alexander threatened him that if he took his final FMLA leave, he would not be allowed to return to work. At his deposition, Daugherty testified that "Ron told me, at the very end, if I took that FMLA [leave] for that period of time [four to six weeks] there would not be a job waiting for me, when I returned." Daugherty asserts that this threat was borne out when, in fact, he was never allowed to return after the leave [**29] of absence.

Clearly, this unambiguous comment, which we must take as true at the summary judgment stage, constitutes direct evidence that Daugherty's termination was motivated by unlawful, discriminatory animus. Alexander was Daugherty's immediate supervisor and a decision maker at Sajar. A fact finder would not be required to draw any inferences to determine that Alexander retaliated against Daugherty when Alexander explicitly threatened such retaliation and the threat -- that Daugherty would not have a job waiting for him when he returned from leave -- was realized. See *DiCarlo, 505 F.3d at 415-16* (decision-making supervisor's remarks to Italian-American employee that he was a "dirty wop" and that there were too many "dirty wops" working at facility, followed two weeks later by supervisor's termination of employee, constituted direct evidence of national-origin discrimination); *Christopher v. Stouder Mem'l Hosp., 936 F.2d 870, 873-74 (6th Cir. 1991)* (affirming district court's determination that direct evidence of discriminatory retaliation under Title VII existed where the plaintiff nurse produced evidence of conversations in which managers at the defendant hospital told her that [**30] her prior sex-discrimination suit was factor in denial of limited privileges to work at the hospital). Alexander's alleged threat to Daugherty does not indicate merely a general bias against employees taking FMLA leave, but rather establishes a

clear connection between Daugherty's last FMLA leave and Sajar's decision to discharge Daugherty from his employment.

The present circumstances are distinguishable from other cases in which we have held that general, vague, or ambiguous comments do not constitute direct evidence of discrimination because such remarks require a factfinder to draw further inferences to support a finding of discriminatory animus. See, e.g., *Blair v. Henry Filters, Inc., 505 F.3d 517, 524-25 (6th Cir. 2007)* (evidence that supervisor removed employee from account because he was "too old" did not constitute direct evidence that age discrimination motivated employee's termination); *Rowan v. Lockheed Martin Energy Sys., 360 F.3d 544, 548-49 (6th Cir. 2004)* (employer's nebulous remarks about general need to lower average age of workforce and stray comment that "the older people should go, bring in some new blood," made years before employees' termination, were not direct [**31] evidence of unlawful age bias); *Hein v. All Am. Plywood Co., 232 F.3d 482, 489 (6th Cir. 2000)* (in context of weight discrimination claim, employer's references to "weight limits" and "Burger Boy" nicknames [*709] deemed not tantamount to direct evidence of discrimination where there was no evidence to connect the alleged prejudice against heavier individuals with the decision to fire employee); *Minadeo v. ICI Paints, 398 F.3d 751, 763-64 (6th Cir. 2005)* (supervisor's general remark about the plaintiff's age "[did] not even approach the standard required for a plaintiff to successfully present direct evidence of an employer's discriminatory motive" in age discrimination claim); and *Johnson v. Kroger Co., 319 F.3d 858, 865 (6th Cir. 2003)* (grocery store manager's alleged comment about potentially [***11] detrimental effect on business of having an African-American co-manager and remark as to African-American plaintiff's lack of ability and intellectual shortcomings did not constitute direct evidence that manager's decision to discharge employee was motivated by racial animus).

Because Daugherty has produced direct evidence of improper motive, the burden shifts to Sajar to prove by a preponderance [**32] of the evidence that it would have made the same decision to discharge Daugherty absent the impermissible motivation. Having reviewed the evidence, we conclude that the question whether Sajar has met this burden is, under the circumstances, for the trier of fact to decide. Although Sajar has proffered evidence that supports its argument that "it was Plaintiff's stubborn refusal to provide legitimate

medical confirmation of the reduction in his medications, not any discriminatory action by Sajar . . . that prevented him from returning [to work], "a genuine issue of material fact exists regarding whether Sajar used the requirement that Daugherty undergo a physical examination by Dr. Altemus, and his resultant medical conclusions, as a subterfuge for Daugherty's retaliatory discharge.

For its part, Sajar argues that Alexander's decision to recall Daugherty within four months of his layoff negates his claim of retaliation. Sajar notes that it never engaged in any adverse employment action against Daugherty following his prior multiple FMLA leaves and contends that there was a legitimate reason for terminating him after his November 2003 leave. It is undisputed that Sajar experienced a downturn [**33] in business, made the legitimate decision to lay off part of its workforce, and selected plaintiff to be laid off because he was the least senior maintenance technician. When the layoff ended and there was a vacancy to be filled in Daugherty's former position, he was notified of the opening by Sajar, but was required to take a physical examination because of his history of back problems and defendant's immediate need for a maintenance technician.

Sajar asserts that it had a reasonable basis for questioning whether Daugherty was able to perform his job duties at the time of the recall. Plaintiff was not returning directly from medical leave; instead, he had been placed on layoff status for over one month as part of an economic downturn. Daugherty's back condition was, by his own admission, unpredictable and episodic. Consequently, because he was placed on layoff status at the same time that his FMLA leave ended, Alexander and Cozzone were unsure whether the two-month leave had resolved Daugherty's most recent aggravation of his back condition. Alexander testified that in light of the urgent need for a maintenance technician at the end of the layoff period, Sajar required the exam because [**34] the company "needed to know if we had to hire somebody else." Alexander explained his decision in the following manner: "[W]e don't know what Jim was doing while he was on layoff . . . if he was working, doing something else, and what his medical condition was. And he has a history of having a bad back, and what we wanted to make sure is . . . [that] he was physically able to return [*710] to work, when we needed him." Alexander further testified that because expediency was an issue, and Sajar often used Dr. Altemus for employee physicals, Alexander knew that Dr. Altemus

was usually "on-call, when we need him." Therefore, Alexander asked Dr. Altemus "if he would see Jim rather quickly, because we were trying to get him back to work."

Sajar maintains that it chose not to rehire Daugherty because he did not submit written confirmation from Dr. Franklin that his medication dosages had been reduced. Sajar asserts that Dr. Franklin's terse note that Daugherty would be able to return to work on January 4, 2004, was written in November 2003 -- when plaintiff began his FMLA leave -- and therefore was not enlightening as to Daugherty's current capabilities. From Sajar's viewpoint, Daugherty held the [**35] key to his own rehire: while purportedly acquiescing in Sajar's suggestion that he have his medication dosages reduced and representing verbally that this had occurred, he refused to provide the requested documentation. Consequently, according to Sajar, Daugherty's inaction raised legitimate concerns about whether Daugherty was being truthful about his prescription drug use, and, therefore, plaintiff was discharged from employment in accordance with defendant's policy regarding layoff status.

[**12] Conversely, however, Daugherty has raised genuine issues of material fact on key points bearing on Sajar's burden of proof, such as whether Sajar actually knew about Daugherty's use of medications before his examination with Dr. Altemus, but never expressed concern about alleged safety issues prior to Daugherty's last FMLA leave; whether Dr. Altemus's medical opinion can be considered independent, or in reality preordained, given that he routinely served in the role of "company physician" for Sajar; whether Dr. Altemus properly took into account Daugherty's specific dosages of medication and the alleged tolerance Daugherty developed to the narcotics; whether Dr. Altemus accurately interpreted [**36] the PDR with respect to the safety of working with heavy machinery while taking the prescribed medications; and whether Sajar reasonably relied upon Dr. Altemus's recommendation, while discounting Dr. Franklin's opinion that Daugherty was fit to return to work.

Viewing the evidence in the light most favorable to Daugherty, we conclude that these material factual disputes preclude summary judgment in Sajar's favor on Daugherty's FMLA retaliation claim. Under the circumstances, it is appropriate for the trier of fact to resolve whether Sajar, in the face of direct evidence of discriminatory animus, has successfully met its requisite

burden of showing that, absent any discriminatory motivation, it would have made the same decision to lay off and not rehire Daugherty. We therefore reverse the district court's contrary order granting summary judgment and dismissing Daugherty's FMLA retaliation claim.

V.

In sum, for the reasons stated above, we affirm the district court's grant of summary judgment on Daugherty's state and federal disability discrimination claims. We reverse the district court's grant of summary judgment on Daugherty's FMLA retaliation claim and remand for further proceedings [**37] consistent with this opinion.

Dussault v. RRE Coach Lantern Holdings, LLC

Supreme Judicial Court of Maine

May 8, 2012, Argued; January 23, 2014, Decided

Docket: Cum-11-591

Reporter

2014 ME 8; 86 A.3d 52; 2014 Me. LEXIS 9; 2014 WL 252094

NICOLE DUSSAULT v. RRE COACH LANTERN HOLDINGS, LLC, et al.

Prior History: Dussault v. Rre Coach Lantern Holdings, 2011 Me. Super. LEXIS 2226 (Me. Super. Ct., Nov. 9, 2011)

Disposition: [***1] Judgment affirmed.

LexisNexis® Headnotes

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN1 Federal law explicitly makes landlords' participation in the Section 8 Housing Choice Voucher Program voluntary.

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN2 See 24 C.F.R. § 982.302(b) (2013)

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN3 Federal regulations require any landlord that accepts a Section 8 housing voucher to include the tenancy addendum in its lease. 24 C.F.R. § 982.308(f) (2013). The addendum sets forth the program requirements for participating landlords and tenants.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN4 An appellate court reviews the trial court's interpretation and application of a statute de novo.

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Cross Motions

HN5 An appellate court reviews the trial court's ruling on cross-motions for summary judgment de novo.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN6 Summary judgment is appropriate if the record reflects that there is no genuine issue of material fact and the movant is entitled to a judgment as a matter of law.

Public Health & Welfare Law > General Overview

Civil Rights Law > ... > Fair Housing Rights > Prohibited Conduct > Leasing & Sales

HN7 See former Me. Rev. Stat. Ann. tit. 5, § 4582 (current version at Me. Rev. Stat. Ann. tit. 5, § 4581-A (2013)).

Public Health & Welfare Law > General Overview

Civil Rights Law > ... > Fair Housing Rights > Prohibited Conduct > Leasing & Sales

HN8 See Me. Rev. Stat. Ann. tit. 5, § 4583.

Public Health & Welfare Law > General Overview

Civil Rights Law > ... > Fair Housing Rights > Prohibited Conduct > Leasing & Sales

HN9 Together, former Me. Rev. Stat. Ann. tit. 5, § 4582 (current version at Me. Rev. Stat. Ann. tit. 5, § 4581-A (2013)) and Me. Rev. Stat. Ann. tit. 5, 4583 establish that a landlord may not refuse to rent to, or impose different terms of tenancy on, a recipient of public assistance who is an otherwise-eligible tenant primarily on the basis of that person's status as a recipient unless the landlord can demonstrate a business necessity that justifies the refusal.

Governments > Legislation > Interpretation

HN10 In construing a statute, the court seeks to give effect to the legislature's intent. It looks beyond the plain

language of the statute to other indicia of legislative intent only if the statute is ambiguous.

Public Health & Welfare Law > General Overview

Civil Rights Law > ... > Fair Housing Rights > Prohibited Conduct > Leasing & Sales

HN11 The only discrimination that the Maine Human Rights Act, Me. Rev. Stat. Ann. tit. 5, §§ 4551-4634 (2007), prohibits with respect to public assistance recipients is refusal to rent or imposition of different terms of tenancy based primarily on a person's status as a recipient. Me. Rev. Stat. Ann. tit. 5, § 4582.

Public Health & Welfare Law > General Overview

Civil Rights Law > ... > Fair Housing Rights > Prohibited Conduct > Leasing & Sales

HN12 A landlord does not violate the Maine Human Rights Act, Me. Rev. Stat. Ann. tit. 5, §§ 4551-4634 (2007), by offering apartments to recipients of public assistance on the same terms as it offers apartments to other potential tenants.

Public Health & Welfare Law > General Overview

Civil Rights Law > ... > Fair Housing Rights > Prohibited Conduct > Leasing & Sales

HN13 The term *status,* although not defined in the Maine Human Rights Act (MHRA), Me. Rev. Stat. Ann. tit. 5, §§ 4551-4634 (2007), is commonly defined as a person's legal condition, whether personal or proprietary; the sum total of a person's legal rights, duties, liabilities, and other legal relations, or any particular group of them separately considered. To the extent that there is any ambiguity in the meaning of *status,* the legislative history of the MHRA makes clear that former Me. Rev. Stat. Ann. tit. 5, § 4582 (current version at Me. Rev. Stat. Ann. tit. 5, § 4581-A (2013)) was meant to proscribe refusals to rent made not with reference to the tenant's personal responsibility and integrity, but only on the general misapprehension that a family on public assistance is automatically an undesirable tenant.

Constitutional Law > Separation of Powers

Governments > Legislation > Interpretation

HN14 In construing a statute, the court is limited by the language that the legislature has enacted, and may not substitute its policy judgment for that of the legislature.

Governments > State & Territorial Governments > Legislatures

Governments > Federal Government > US Congress

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN15 The issue of ensuring affordable housing availability is an issue for the Maine Legislature or the United States Congress, which have the power to establish policy and enact laws in this area.

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN16 The Maine Legislature has not required landlords to accept Section 8 vouchers.

Civil Rights Law > ... > Fair Housing Rights > Prohibited Conduct > Leasing & Sales

HN17 Courts have historically addressed claims of direct evidence of discrimination through a mixed-motive analysis. Pursuant to that analysis, where a plaintiff claims discrimination by a landlord, the plaintiff must first offer evidence that her status as a public assistance recipient was a motivating factor in the landlord's refusal to rent to her. The defendant landlord then bears the burden of producing evidence that it would have refused to rent to the potential tenant even if she were not a recipient of public assistance.

Evidence > Burdens of Proof > Initial Burden of Persuasion

Evidence > Burdens of Proof > Burden Shifting

Civil Rights Law > ... > Fair Housing Rights > Prohibited Conduct > Leasing & Sales

HN18 With respect to a claim of discrimination by a landlord, when a plaintiff makes a disparate treatment claim at the summary judgment stage, a three-step, burden-shifting test applies. First, the plaintiff must establish a prima facie case of discrimination. Second, if the plaintiff has met her burden in the first step, the landlord must present evidence of a legitimate, non-discriminatory reason for the adverse action. Third, if the landlord meets its burden in the second step, the plaintiff must present evidence that the landlord's proffered reason is pretextual or untrue. This analysis addresses the parties' burdens of production, not persuasion.

Public Health & Welfare Law > General Overview

Civil Rights Law > ... > Fair Housing Rights > Prohibited Conduct > Leasing & Sales

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN19 Nothing in the language of the Maine Human Rights Act (MHRA), *Me. Rev. Stat. Ann. tit. 5, §§ 4551-4634* (2007), suggests that it imposes disparate impact liability on a landlord for discrimination against an individual because of the individual's status as a recipient of public assistance. Nothing in the language of *Me. Rev. Stat. Ann. tit. 5, § 4583* broadens the MHRA's protections of recipients of public assistance; rather, *§ 4583* limits those protections by providing landlords with a defense of business necessity for conduct that might otherwise violate former *Me. Rev. Stat. Ann. tit. 5, § 4582* (current version at *Me. Rev. Stat. Ann. tit. 5, § 4581-A* (2013)). Therefore, the Supreme Judicial Court of Maine concludes, as a matter of law, that the MHRA, as currently established by the Maine Legislature, does not create disparate impact liability in the context of claims of housing discrimination based on a landlord's decision not to participate in the voluntary voucher program established by Section 8.

Governments > Courts > Authority to Adjudicate

Governments > Courts > Judicial Precedent

Civil Rights Law > General Overview

Governments > Legislation > Interpretation

HN20 Although the Supreme Judicial Court of Maine looks to federal law for guidance in interpreting the Maine Human Rights Act, *Me. Rev. Stat. Ann. tit. 5, §§ 4551-4634* (2007), it must not abdicate its function of conclusively resolving matters of purely state law.

Governments > Courts > Judicial Precedent

Governments > Legislation > Interpretation

HN21 In the absence of clear and explicit statutory language showing that the legislature intended a statute to modify case law, the court will not interpret a statute to effect such a modification.

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Judges: Panel: SAUFLEY, C.J., and ALEXANDER, LEVY, SILVER, MEAD, GORMAN, and JABAR, JJ. Majority: SAUFLEY, C.J., and ALEXANDER, SILVER, and MEAD, JJ. Concurrence: ALEXANDER, J. Dissent: LEVY, GORMAN, and JABAR, JJ.

Opinion by: SILVER

Opinion

[**55] SILVER, J.

[*P1] Nicole Dussault appeals from a summary judgment entered in the Superior Court (Cumberland County, *Cole, J.*) in favor of RRE Coach Lantern Holdings, LLC, and Resource Real Estate Management, Inc. (collectively, Coach Lantern). Dussault claims that Coach Lantern's policy of not including in its standard lease a tenancy addendum that binds the landlord to the requirements of the federal government's Section 8

Housing Choice Voucher Program constitutes unlawful discrimination on the basis of her status [***3] as a public assistance recipient in violation of 5 M.R.S. § 4582 (2007)¹ of the Maine Human Rights Act (MHRA), 5 M.R.S. §§ 4551-4634 (2007). She also argues that the court erred by granting Coach Lantern's motion for summary judgment and denying her cross-motion for summary judgment based on three theories of discrimination: direct evidence, disparate treatment, and disparate impact. We disagree and affirm the judgment.

I. FACTUAL AND LEGAL BACKGROUND

[*P2] The following facts are drawn from the summary judgment record and are not disputed by the parties. Nicole [**56] Dussault and her three children became homeless in June 2008 following a foreclosure on Dussault's home. On July 14, 2008, Dussault was issued a voucher pursuant to the Section 8 Housing Choice Voucher Program by Avesta Housing, a nonprofit organization that administers the federal voucher program as a contract agent for the Maine State [***4] Housing Authority.² Through the voucher program, the Housing Authority provides assistance to people with low incomes by subsidizing rent. The Housing Authority pays a portion of the voucher recipient's rent each month directly to the landlord for a unit of the recipient's choosing. See 24 C.F.R. § 982.1 (2013). The Housing Authority calculates an amount of rent for which the recipient is responsible, which is usually equal to thirty percent of the recipient's adjusted income as defined by statute. See 42 U.S.C.A. §§ 1437a(b)(5), 1437f(o)(2)(A)-(B) (West, Westlaw through P.L. 113-65 (excluding P.L. 113-54) approved 12-20-13). **HN1** Federal law explicitly makes landlords' participation in the voucher program voluntary. **HN2** See 24 C.F.R. § 982.302(b) (2013) ("If the family finds a unit, and the owner is willing to lease the unit under the program, the family may request [Housing Authority] approval of the tenancy." (emphasis added)).

[*P3] Dussault sought housing in Scarborough in order to maintain her son's placement in the school system

there. Through Craigslist, Dussault found a listing for a three-bedroom apartment in the Coach Lantern Apartments in Scarborough with an advertised rent that was within the voucher program limits. The apartment is owned by RRE Coach Lantern Holdings, LLC, of which Resource Real Estate Management, Inc., is an affiliate.

[*P4] On August 5, 2008, Dussault called Coach Lantern to inquire about renting the apartment. Dussault alleges that after she disclosed that she would be using a voucher to pay the rent, she was told that Coach Lantern does not accept vouchers. She alleges that her caseworker at Avesta Housing was told the same thing by Coach Lantern when the caseworker inquired on Dussault's behalf. Approximately two weeks later Dussault again called Coach Lantern to inquire about [***6] the apartment, but she did not mention that she would be using a voucher. After arranging an appointment and being shown the apartment, Dussault was given a rental application. A Coach Lantern employee encouraged her to fill it out. Two days later a Coach Lantern representative called Dussault to ask if she planned to submit the application. Dussault did submit an application, and on it she disclosed that she would be using a voucher. Dussault qualified for an apartment and "was accepted."

[*P5] Dussault's Avesta caseworker sent Coach Lantern a "landlord packet" indicating that in order for Dussault to be able to use her voucher, Coach Lantern would have to include a HUD tenancy addendum in her lease. **HN3** Federal regulations require any landlord that accepts a housing voucher to include the tenancy addendum in its lease. 24 C.F.R. § 982.308(f) (2013). The addendum sets [**57] forth the program requirements for participating landlords and tenants. *Id.*; see also 24 C.F.R. §§ 982.308-.310 (2013). The caseworker informed Coach Lantern that paperwork would need to be filled out before a HUD-mandated property inspection could take place, and that the paperwork and inspection process "could take a couple [***7] of weeks."

¹ Title 5 M.R.S. § 4582 has been repealed and replaced by P.L. 2011, ch. 613, §§ 11-12 (effective Sept. 1, 2012) (codified at 5 M.R.S. § 4581-A (2013)), but the change does not affect this appeal. The relevant language of the new section 4581-A is substantially identical to that of prior section 4582.

² The federal program originated with section 8 of the United States Housing Act of 1937, P.L. 75-412, 50 Stat. 888, as amended by the Housing and Community Development Act of 1974, P.L. 93-383, § 201(a), 88 Stat. 633, 662-666, and is now codified at 42 U.S.C.A. § 1437f [***5] (West, Westlaw through P.L. 113-65 (excluding P.L. 113-54) approved 12-20-13), with associated regulations at 24 C.F.R. §§ 982.1-.643 (2013). It is administered by the United States Department of Housing and Urban Development (HUD) in conjunction with state and local housing agencies. See 24 C.F.R. §§ 982.1, 982.3.

[*P6] Coach Lantern, through its attorney, contacted Avesta Housing by letter dated September 3, 2008, to state its "problem with the inclusion of a Tenancy Addendum with [the standard] lease" and to see whether it could rent to Dussault without including the addendum in her lease. The letter stated, "I wish to make it absolutely clear that my client is not refusing to rent to [Dussault] primarily because she is a recipient of public assistance," but because "[t]he addendum includes more restrictive rights and obligations on the landlord th[a]n the standard lease that they use, and my client does not wish to be bound by these more restrictive obligations." Avesta Housing replied by email dated September 12, 2008, that Coach Lantern could not rent to Dussault without including the addendum.

[*P7] Coach Lantern is unwilling to include the addendum in any of its leases. Specifically, Coach Lantern finds it unacceptable that pursuant to the addendum the landlord agrees (1) to maintain the unit and premises in accordance with the housing quality standards set by the Housing Authority; (2) not to raise the rent during the initial term of the lease; (3) to charge a "reasonable" rent, as determined [***8] by the Housing Authority in accordance with HUD requirements, during the lease term; (4) not to evict the tenant or terminate the lease solely because the Housing Authority has failed to pay the subsidized portion of the rent; (5) not to evict a tenant who is a victim of domestic violence based on acts of domestic violence committed against her, unless the landlord can demonstrate an actual and imminent threat to other tenants or employees; (6) to open the premises to inspection by a Housing Authority inspector at the beginning of the lease, upon any complaint by the tenant, or after the landlord has remedied a problem identified by an inspector in a prior inspection; and (7) to notify the Housing Authority at least sixty days prior to any rent increase.

[*P8] Dussault was unable to afford the apartment without using the voucher. Because she could not use the voucher unless Coach Lantern included the addendum in her lease, she did not rent the apartment. She could not find housing in Scarborough and ultimately moved to South Portland. Dussault does not intend to seek housing at any Coach Lantern property in the future.

II. PROCEDURAL BACKGROUND

[*P9] In November 2008, Dussault filed a complaint [***9] with the Maine Human Rights Commission (Commission), alleging that Coach Lantern's policy of refusing to include the HUD tenancy addendum in her lease, and therefore its refusal to participate in the voucher program, constitutes discrimination against Dussault on the basis of her status as a public assistance recipient in violation of the MHRA. After an investigation, the Commission voted unanimously at a hearing on April 13, 2009, that there were reasonable grounds to believe that Coach Lantern discriminated against Dussault because of her status as a recipient of public assistance.

[*P10] Dussault then filed a complaint in the Superior Court seeking declaratory and injunctive relief and damages. Coach Lantern filed a motion for summary judgment [**58] and Dussault filed a cross-motion.³ The court granted Coach Lantern's motion and denied Dussault's motion, ruling in favor of Coach Lantern on each of three theories of discrimination. First, the court determined that there was no direct evidence of discrimination, and thus declined to perform a mixed-motive analysis. Next, the court concluded that Dussault failed to meet her burden, as part of the three-step, burden-shifting test that applies when [***10] there is no direct evidence of discrimination, to produce sufficient evidence that Coach Lantern's proffered reasons for refusing to participate in the voucher program were pretextual. Finally, in performing a discriminatory impact analysis, the court concluded that Coach Lantern's policy affects recipients of public assistance more harshly than housing applicants who do not intend to use vouchers, but that the policy is justified by a business necessity.

[*P11] Dussault timely appealed.

III. DISCUSSION

A. Standard of Review

[*P12] **HN4** We review the court's interpretation and application of the MHRA de novo. *See Russell v. ExpressJet Airlines, Inc.*, 2011 ME 123, P 16, 32 A.3d 1030. **HN5** "We review the court's ruling on cross-motions for summary judgment de novo . . ." *F.R. Carroll, Inc. v. TD Bank, N.A.*, 2010 ME 115, P 8, 8 A.3d 646. **HN6** "Summary judgment is appropriate if the record reflects that there is no genuine issue of material

³ Dussault withdrew her request for injunctive relief in her motion for summary judgment, as she does not plan to seek housing at Coach Lantern properties in the future.

fact and the movant is entitled to a judgment as a matter of law." *Id.* (quotation marks omitted).

B. The Maine [***11] Human Rights Act

[*P13] The MHRA declares that individuals have a civil right to "[t]he opportunity . . . to secure decent housing in accordance with [their] ability to pay, and without discrimination because of race, color, sex, sexual orientation, physical or mental disability, religion, ancestry, national origin or familial status." 5 M.R.S. § 4581.⁴ Although the MHRA does not reference status as a recipient of public assistance in this declaration, *see id.*, the MHRA does provide certain protections to public assistance recipients. Section 4582 provides in relevant part:

HN7 It is unlawful housing discrimination, in violation of this Act

...

[f]or any person furnishing rental premises or public accommodations to refuse to rent or impose different terms of tenancy to any individual who is a recipient of federal, state or local public assistance, including medical assistance and housing subsidies primarily because of the individual's status as recipient .

...

5 M.R.S. § 4582. Section 4583, however, provides in relevant part:

HN8 Nothing in this Act may be construed to prohibit or limit the exercise of the privilege of every person and the agent of any person having the right to sell, rent, lease or [***12] manage a housing accommodation to set up and enforce specifications in the selling, renting, leasing or letting or in the furnishings of facilities or services in connection with the facilities that are consistent with business [**59] necessity and are not based on the race, color, sex, sexual orientation, physical or mental disability, religion, country of ancestral origin or familial status of or the receipt of public assistance payments by any prospective or actual purchaser, lessee, tenant or occupant.

5 M.R.S. § 4583. **HN9** Together these sections establish

that a landlord may not refuse to rent to, or impose different terms of tenancy on, a recipient of public assistance who is an otherwise-eligible tenant primarily on the basis of that person's status as a recipient unless the landlord can demonstrate a business necessity that justifies the refusal.

[*P14] **HN10** In construing a statute, we seek to give effect to the Legislature's intent. *See Eagle Rental, Inc. v. State Tax Assessor, 2013 ME 48, P 11, 65 A.3d 1278*. We look beyond [***13] the plain language of the statute to other indicia of legislative intent only if the statute is ambiguous. *See id.*; *Fuhrmann v. Staples the Office Superstore E., Inc., 2012 ME 135, P 23, 58 A.3d 1083*. **HN11** The only discrimination that the MHRA prohibits with respect to public assistance recipients is "refus[a] to rent or impos[ition of] different terms of tenancy" based primarily on a person's status as a recipient. 5 M.R.S. § 4582. This language stands in contrast to the broader prohibition against housing discrimination on other bases, which makes it a violation of the MHRA to "refuse to show or refuse to sell, rent, lease, let or otherwise deny to or withhold from any individual housing accommodation because of the race or color, sex, sexual orientation, physical or mental disability, religion, ancestry, national origin or familial status of the individual." *Id.* (emphasis added).

[*P15] We previously construed the MHRA's prohibition of "unlawful housing discrimination" based on receipt of public assistance in *Catir v. Commissioner of the Department of Human Services, 543 A.2d 356, 357-58 (Me. 1988)*. In *Catir*, a nursing home that had accepted state and federal Medicaid reimbursement stopped [***14] participating in the program and informed residents that it would no longer keep residents who were unable to pay the higher, private rate. *Id. at 357*. Residents receiving Medicaid sued, seeking a declaration that the nursing home was obligated to accept Medicaid reimbursement. *Id.* We upheld summary judgment for the nursing home, reasoning that it was not unlawful discrimination for the nursing home to stop participating in the Medicaid program and to require the residents receiving Medicaid to pay the same rate as residents not receiving Medicaid. *Id. at 357-58*. We concluded that the nursing home had not "refuse[d] to rent or impose[d] different terms of tenancy" on the Medicaid recipients because the record showed that, by refusing to accept the lower Medicaid payment,

⁴ Title 5 M.R.S. § 4581 has since been amended by P.L. 2011, ch. 613, § 10 (effective Sept. 1, 2012) (codified at 5 M.R.S. § 4581 (2013)), but the change does not affect this appeal.

the nursing home merely "subjected the [Medicaid] recipients to the same terms of tenancy offered to any other individual." *Id.* at 357-58 (first and second alterations in original) (quotation marks omitted).

[*P16] Here, as in *Catir*, the undisputed facts demonstrate that Coach Lantern did not "refuse to rent [to] or impose different terms of tenancy" on Dussault. Rather, Coach Lantern was willing to, and in fact did, offer [***15] Dussault the apartment, and was willing to rent to her after learning of her status so long as it could do so without including the tenancy addendum. In essence, Coach Lantern offered to rent the apartment to Dussault on "the same terms of tenancy offered to any other individual." *Id.* at 358. **HN12** A landlord does not violate the MHRA by offering apartments to recipients of public assistance on the same terms as it offers [**60] apartments to other potential tenants. See *id.*

[*P17] Even if we were convinced that Coach Lantern's policy of declining to include the tenancy addendum in Dussault's lease constituted a refusal to rent or imposition of different terms of tenancy within the meaning of section 4582, the undisputed facts show that Coach Lantern's refusal to include the addendum was not "primarily because of [Dussault's] status as recipient," but rather because Coach Lantern did not wish to bind itself to the terms of the tenancy addendum. **HN13** The term "status," although not defined in the MHRA, is commonly defined as "[a] person's legal condition, whether personal or proprietary; the sum total of a person's legal rights, duties, liabilities, and other legal relations, or any particular group of them [***16] separately considered." *Black's Law Dictionary* 1542 (9th ed. 2009). To the extent that there is any ambiguity in the meaning of "status," the legislative history of the MHRA makes clear that the statute was meant to proscribe refusals to rent "made not with reference to the tenant's personal responsibility and integrity . . . but only on the general misapprehension that a family on public assistance is automatically an undesirable tenant." L.D. 327, Statement of Fact (107th Legis. 1975).

[*P18] We recognize the MHRA's purpose to protect public assistance recipients' rights to secure decent housing. We will not, however, read into the MHRA a mandate that landlords accept terms of tenancy that are otherwise required only if the landlord chooses to participate in a voluntary federal program. See 24 C.F.R. § 982.302(b) (noting that the voucher program is

voluntary); see also *Edwards v. Hopkins Plaza Ltd. P'ship*, 783 N.W.2d 171, 176-77 (Minn. Ct. App. 2010) (concluding that the voucher program is voluntary pursuant to state and federal law).

[*P19] **HN14** We are limited by the language that the Legislature has enacted, and may not substitute our policy judgment for that of the Legislature. See *Edwards*, 783 N.W.2d at 179 [***17] (**HN15** "[T]he issue of ensuring affordable housing availability is an issue for the . . . Legislature or the United States Congress, which have the power to establish policy and enact laws in this area."). **HN16** The Legislature has not required landlords to accept Section 8 vouchers. Although the Legislature has considered a bill that would have effectively required landlords to participate in the voucher program, it has not, to date, made this voluntary program mandatory in Maine. See L.D. 685, § 2 (123rd Legis. 2007) (proposing an amendment to the MHRA forbidding discrimination against recipients of public assistance "because of any requirement of such a public assistance program"); Comm. Amend. A to L.D. 685, No. S-162 (123rd Legis. 2007) (removing the language regarding discrimination based on the requirements of public assistance programs from the bill).

C. Summary Judgment

[*P20] [***18] In deciding the parties' cross-motions for summary judgment, the Superior Court ruled in favor of Coach Lantern on each of three different theories of discrimination: direct evidence, disparate treatment, and disparate impact. We address each theory in light of the interpretation of the MHRA that we have now articulated.

1. Direct Evidence

[*P21] **HN17** Courts have historically addressed claims of direct evidence of discrimination through a "mixed-motive" analysis. See *Patten v. Wal-Mart Stores E., Inc.*, 300 F.3d 21, 25 (1st Cir. 2002). Pursuant to that analysis, a plaintiff must [**61] first offer evidence that her status as a public assistance recipient was a "motivating factor" in the landlord's refusal to rent to her. See *id.* (emphasis omitted). The defendant landlord then bears the burden of producing evidence that it would have refused to rent to the potential tenant even if she were not a recipient of public assistance. See *id.* Because the undisputed facts demonstrate that, in declining to include the tenancy addendum in its lease, Coach Lantern did not "refuse to rent or impose different terms of tenancy" on Dussault based primarily upon her

status as a recipient of public assistance, Dussault has [***19] failed to present a prima facie case of discrimination on a direct evidence theory.⁵

2. Disparate Treatment

[*P22] **HN18** When a plaintiff makes a disparate treatment claim at the summary judgment stage, a three-step, burden-shifting test applies. See Daniels v. Narraguagus Bay Health Care Facility, 2012 ME 80, P 14, 45 A.3d 722. First, the plaintiff must establish a prima facie case of discrimination. See *id.* Second, if the plaintiff has met her burden in the first step, the landlord must present evidence of a legitimate, non-discriminatory reason for the adverse action. See *id.* P 15. Third, if the landlord meets its burden in the second step, the plaintiff must present evidence that the landlord's proffered reason is pretextual or untrue. See *id.* This analysis addresses the parties' burdens of production, not persuasion. [***20] See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08, 521, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

[*P23] Here again, Dussault has failed to establish a prima facie case, because the undisputed facts show that Coach Lantern did not "refuse to rent or impose different terms of tenancy" on Dussault based primarily upon her status as a recipient of public assistance. See Lindsay v. Yates, 578 F.3d 407, 415 (6th Cir. 2009) (requiring the plaintiff in a housing discrimination case to provide prima facie evidence that he or she applied for and was denied a housing accommodation); McDonald v. Coldwell Banker, 543 F.3d 498, 503, 505 (9th Cir. 2008) (same); Mitchell v. Shane, 350 F.3d 39, 47 (2d Cir. 2003) (same); see also Cookson v. Brewer Sch. Dep't, 2009 ME 57, P 14, 974 A.2d 276 (discussing the requirement of a prima facie showing of discrimination in the employment context).

3. Disparate Impact

[*P24] We evaluate claims of disparate impact in the employment context using a similar three-step, burden-shifting analysis. See Me. Human Rights Comm'n v. City of Auburn, 408 A.2d 1253, 1264-65.

1268 (Me. 1979). First, the plaintiff must establish a prima facie case of disparate impact by identifying a facially neutral practice that affects [***21] one group more harshly than another. *Id.* at 1264. Second, if the plaintiff meets her burden in the first step, the defendant must present prima facie evidence that its practice is justified by a business necessity. *Id.* at 1265. Finally, if the defendant meets its burden in the second step, the plaintiff must present prima facie evidence that the defendant's proffered justification is pretextual or that other practices would have a less discriminatory impact. *Id.* at 1268.

[*P25] **HN19** [**62] Nothing in the language of the MHRA suggests, however, that it imposes disparate impact liability on a landlord for discrimination against an individual because of the individual's status as a recipient of public assistance. See Smith v. City of Jackson, 544 U.S. 228, 233-40, 125 S. Ct. 1536, 161 L. Ed. 2d 410 (2005) (concluding that the Age Discrimination in Employment Act created disparate impact liability because its text "focuses on the effects of the action on the employee rather than the motivation for the action of the employer").⁶ As we have noted, the only discrimination that the MHRA prohibits with respect to public assistance recipients is "refus[al] to rent or impos[ition of] different terms of tenancy" based primarily on a person's status [***22] as a recipient. 5 M.R.S. § 4582.

[*P26] Dussault argues that section 4583 incorporates disparate impact liability into the housing discrimination provisions of the MHRA, and that the legislative history of the statute supports this contention. This argument, however, finds no support in the language of section 4583. See Eagle Rental, 2013 ME 48, P 11, 65 A.3d 1278 (noting that we do not consider legislative history if a statute is unambiguous). Nothing in the language of section 4583 broadens the MHRA's protections of recipients of public assistance; rather, section 4583 limits those protections by providing landlords with a defense of business necessity for conduct that might otherwise violate section 4582. See Smith, 544 U.S. at 251-52 (O'Connor, J., concurring) (opining that, contrary

⁵ Given this conclusion, we need not address the continuing vitality of the "mixed-motive" analysis in light of Gross v. FBL Financial Services, Inc., 557 U.S. 167, 173-80, 129 S. Ct. 2343, 174 L. Ed. 2d 119 (2009) (interpreting the Age Discrimination in Employment Act's bar on discrimination "because of" age as requiring a showing of but-for causation, rather than a showing that age was simply a motivating factor).

⁶ Although none of the parties or amici have directly argued that the MHRA does not impose disparate impact liability on a landlord for discrimination against an individual because of the individual's status as a recipient of public assistance, a necessary first step in our analysis is to determine whether such liability exists.

to the plurality opinion, a provision in the Age Discrimination in Employment Act [***23] permitting discrimination based on "reasonable factors other than age" did not create disparate impact liability, but rather created a "safe harbor" for defendants (emphasis omitted) (quotation marks omitted)). We therefore conclude, as a matter of law, that the MHRA, as currently established by the Maine Legislature, does not create disparate impact liability in the context of claims of housing discrimination based on a landlord's decision not to participate in the voluntary voucher program established by Section 8.

[*P27] In reaching the opposite conclusion, the dissent relies heavily on the federal courts' interpretation of the Fair Housing Act (FHA), 42 U.S.C.A. §§ 3601-3631 (West, Westlaw through P.L. 113-65 (excluding P.L. 113-54) approved 12-20-13). Unlike the MHRA, however, the FHA does not prohibit housing discrimination on the basis of an individual's status as a recipient of public assistance. *Id.* § 3604(a)-(e) (prohibiting housing discrimination "because of race, color, religion, sex, familial status, or national origin"). Moreover, the FHA more broadly defines the discrimination it prohibits, making it a violation of the Act "[t]o refuse to sell or rent after the making of a [***24] bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person" because of their protected status. *Id.* § 3604(a) (emphasis added). This language stands in contrast to the MHRA's relatively narrow prohibition of "refus[al] to rent or impos[ition of] different terms of tenancy" based primarily on a person's status as a recipient of public assistance. 5 M.R.S. § 4582; see also *Smith*, 544 U.S. at 233-40. **HN20** Although we look to federal law for guidance in interpreting the MHRA, we [*63] "must not abdicate [our] function of conclusively resolving matters of purely state law." *Fuhrmann*, 2012 ME 135, P 27, 58 A.3d 1083 (alteration in original) (quotation marks omitted). This is particularly true where Congress has taken pains to identify the voucher program as entirely voluntary.

[*P28] The dissent's interpretation of section 4583 would effectively compel Maine's landlords to participate in a voluntary federal housing subsidy program or risk having to litigate whether their decision not to participate is based on a "business necessity." For many of Maine's small or mid-sized landlords, the expense and uncertainty of litigation simply may [***25] not be an option. Had the Legislature intended to impose this requirement on landlords, it would have done so clearly,

particularly in light of the fact that it would have effectively overruled our holding in *Catir*. See 543 A.2d at 357-58 (holding that a nursing home did not violate the MHRA by offering housing to Medicaid recipients on "the same terms of tenancy offered to any other individual"). **HN21** "In the absence of *clear and explicit* statutory language showing that the legislature intended a statute to modify case law, we will not interpret a statute to effect such a modification." *Caron v. Me. Sch. Admin. Dist. No. 27*, 594 A.2d 560, 563 (Me. 1991) (emphasis added).

[*P29] The dissent suggests that our interpretation of the MHRA allows landlords to avoid liability by simply alleging business necessity rather than proving it. Dissenting Opinion P 58. We do not so hold. Rather, because we conclude that sections 4582 and 4583 do not create disparate impact liability in the context of claims of housing discrimination based on a landlord's decision not to accept the tenancy addendum in order to participate in the voucher program, and because Dussault has not otherwise made out a prima facie case [***26] of housing discrimination, we do not reach the issue of business necessity.

D. Conclusion

[*P30] Because the undisputed facts show that Coach Lantern did not discriminate against Dussault in violation of the MHRA, we affirm the summary judgment in favor of Coach Lantern and the denial of Dussault's cross-motion for summary judgment.

The entry is:

Judgment affirmed.

Concur by: ALEXANDER

Concur

ALEXANDER, J., concurring.

[*P31] I am pleased to join the Court's opinion. I write separately to note that the Maine Legislature has explicitly rejected the change in the law urged by the Dissent that would interpret current Maine law to mandate acceptance of onerous contract conditions that come with the Section 8 program by all landlords except those capable of assuming the heavy cost of litigation to demonstrate "business necessity" to avoid the contractual mandates.

[*P32] Since its inception, the Section 8 Housing Choice Voucher Program, established pursuant to 42 U.S.C.A. § 1437f(o) (West, Westlaw through P.L. 113-65 (excluding P.L. 113-54) approved 12-20-13) and 24 C.F.R. pt. 982 (2013),⁷ has been a voluntary program with property owners free to choose to enter into lease contracts [*64] with tenants supported by vouchers only if "the [***27] owner is willing to lease the unit under the program." 24 C.F.R. § 982.302(b); see also Park Village Apartment Tenants Ass'n v. Mortimer Howard Trust, 636 F.3d 1150, 1161-62 (9th Cir. 2011), cert. denied 132 S. Ct. 756, 181 L. Ed. 2d 482 (2011); Edwards v. Hopkins Plaza Ltd. P'ship, 783 N.W.2d 171, 176 (Minn. Ct. App. 2010).

[*P33] As the Court's Opinion notes, the Section 8 program in Maine has been administered as a voluntary program. This litigation represents an attempt, promoted by the Maine Human Rights Commission, to convert the Section 8 program in Maine into a compulsory program and to secure by judicial action an amendment to the housing discrimination laws that the Maine Legislature explicitly refused to adopt.

[*P34] The record reflects that in 2007, the Maine Human Rights Commission supported an effort to [***28] amend former 5 M.R.S. § 4582 (2007), now 5 M.R.S. § 4581-A(4) (2013), to make it unlawful to decline to rent properties because of the additional contractual burdens imposed on owners as a condition for rental to individuals whose rent would be supported by Section 8 housing vouchers. L.D. 685, § 2 (123rd Legis. 2007). This effort to change the discrimination laws from prohibiting different, special treatment of subsidized tenancies to requiring different, special treatment of subsidized tenancies failed. The provision mandating acceptance of the additional contractual burdens was stricken from the legislation that made other amendments to the Maine Human Rights Act. Comm. Amend. A to L.D. 685, No. S-162 (123rd Legis. 2007). The other revisions of law were then enacted as P.L. 2007, ch. 243.

[*P35] The Legislature's specific refusal to change the housing discrimination law from the interpretation we gave it in Catir v. Commissioner of the Department of Human Services, 543 A.2d 356 (Me. 1988), is an indicator of legislative intent that must be respected.

[*P36] Our rules of statutory construction establish that when a law has been interpreted by a judicial opinion, we do not later change that interpretation [***29] absent "clear and explicit" statutory language demonstrating legislative intent to change prior case law. Caron v. Me. Sch. Admin. Dist. No. 27, 594 A.2d 560, 563 (Me. 1991) (stating that, absent clear and explicit statutory language showing legislative intent to modify case law interpreting a statute, this Court will not interpret a statute to effect such a modification); see also Tripp v. Philips Elmet Corp., 676 A.2d 927, 930-31 (Me. 1996) (same); Rubin v. Josephson, 478 A.2d 665, 671 (Me. 1984) (same).

[*P37] Here there has been no "clear and explicit" statutory language demonstrating legislative intent to change the interpretation we adopted in Catir. To the contrary, there is an explicit refusal by the Maine Legislature to enact the change in the law supported by the Maine Human Rights Commission and apparently adopted by the dissent today. Such a major change of policy is a matter best left to resolution by the Maine Legislature after it considers all the implications of such a change. It is not a change that should be adopted by judicial action after the Legislature refused to make the change supported by the Maine Human Rights Commission.

Dissent by: LEVY; GORMAN; JABAR

Dissent

LEVY, J., with whom GORMAN [***30] and JABAR, JJ., join, dissenting.

[*P38] I agree with the Court's conclusion that the Maine Human Rights Act (MHRA), 5 M.R.S. §§ 4551-4634 (2007), does not make participation in the Section 8 housing assistance program mandatory, [**65] and that the MHRA prohibits landlords from intentionally discriminating against recipients of public assistance. However, I conclude that the MHRA prohibits housing practices that have a disparate impact on recipients of public assistance when such decisions are not justified by a business necessity. I also disagree with the Court's conclusion that Coach Lantern did not "refuse to rent" to Dussault for purposes of section 4582. For these reasons, I respectfully dissent.

⁷ The Department of Housing and Urban Development regulations covering the voucher program, including the requirements imposed on property owners at 24 C.F.R. pt. 982, extend to eighty-two pages of double column, small print text in the Code of Federal Regulations. Access to and comprehension of those regulations may present a considerable challenge to many individual property owners covered by this law.

A. Whether Coach Lantern "Refused to Rent" to Dussault

[*P39] Before discussing why disparate impact liability applies in this case, it is necessary to address the threshold question of whether Coach Lantern's actions exposed it to liability pursuant to the MHRA. The MHRA deems it unlawful "to refuse to rent or impose different terms of tenancy" primarily because of an individual's status as a recipient of public assistance. 5 M.R.S. § 4582. The Court concludes that Coach Lantern did not "refuse to rent" [***31] to Dussault because Coach Lantern expressed its willingness to rent to her so long as it could do so without including the HUD tenancy addendum in its lease. Court's Opinion P 16. The Court relies heavily on our holding in Catir v. Commissioner of the Department of Human Services, 543 A.2d 356, 357-58 (Me. 1988), which was decided before the "business necessity" defense was added to section 4583 in 2007. See P.L. 2007, ch. 243, § 4 (effective Sept. 20, 2007). In Catir, we upheld a summary judgment for a nursing home that terminated its participation in the Medicaid program because "there [was] no allegation or suggestion that the nursing home 'refuse[d] to rent or impose[d] different terms of tenancy' on Medicaid recipients" by making them pay the same higher rate as non-Medicaid patients. 543 A.2d at 357-58 (first alteration added) (quoting 5 M.R.S.A. § 4582 (Pamph. 1987)).

[*P40] Catir is inapposite to the present case for several reasons. First, our opinion stated that the material facts were "undisputed," id. at 357, and that the "plaintiffs' affidavits clearly establish that the nursing home refused to accept the lower Medicaid payment and subjected the recipients to the same terms of [***32] tenancy offered to any other individual," id. at 358 (emphasis added). Thus, the summary judgment record demonstrated that the nursing home's refusal to serve the plaintiffs as Medicaid patients was not based on the plaintiffs' status as recipients of public assistance, but was instead based on its decision to no longer accept the Medicaid reimbursement rate. Because Catir was decided before the business necessity exception was added to section 4583, we had no reason to consider whether the nursing home's refusal to accept the Medicaid reimbursement rate was based on business necessity.

[*P41] Second, the more fundamental issue in Catir was not whether the nursing home "refuse[d] to rent" to its Medicaid recipients, but whether it "impose[d]"

different terms of tenancy" on them by making them pay the higher private rate that non-Medicaid patients paid. In holding that the nursing home had not imposed different terms of tenancy, we noted that "[t]he equality of housing access secured by the Maine Human Rights Act is premised upon the assumption that the persons seeking the housing have the ability to pay." 543 A.2d at 358. In contrast with the plaintiffs' presumed inability to pay the higher [***33] private rate at issue in Catir, there is no dispute here that Dussault, with the assistance of the Section 8 housing subsidy, had the ability to pay the rent asked by Coach Lantern.

[*P42] [**66] In extending Catir so that it controls the outcome of this case, the Court adopts too narrow a view of what it means for a landlord to "refuse to rent" to a prospective tenant. Here, Coach Lantern would not rent an apartment to Dussault so long as the HUD tenancy addendum was included in the lease. Therefore, regardless of the reason for its refusal, Coach Lantern "refused to rent" to Dussault pursuant to the plain language of section 4582. The Court's characterization of Coach Lantern as being "willing" to rent to Dussault is misplaced, for Coach Lantern was "willing" to rent to Dussault only if she relinquished her status as a recipient of public assistance. Court's Opinion P 16. The Court's interpretation of section 4582 would effectively sanction a landlord's refusal to rent to a tenant based on the tenant's protected status so long as the landlord simply asserted that it was "willing" to accept the tenant should she change her status.

[*P43] On the facts before us, I conclude that Coach Lantern "refused to [***34] rent" to Dussault pursuant to section 4582. I now turn to whether Coach Lantern's refusal to rent was "primarily because of" Dussault's status as the recipient of public assistance.

B. Disparate Impact Liability Pursuant to the MHRA

[*P44] The MHRA makes it unlawful "to refuse to rent . . . to any individual . . . primarily because of the individual's status as [a] recipient" of public assistance. 5 M.R.S. § 4582. The Court construes the phrase "primarily because of" to proscribe only intentional discrimination against recipients of public assistance, and not housing decisions that have a disparate impact on such recipients. This construction, which was not argued by Coach Lantern before the Superior Court or this Court, is contrary to sections 4582 and 4583.

1. The Plain Meaning of Sections 4582 and 4583 Recognizes Disparate Impact Liability

[*P45] "When construing the language of a statute, we look first to the plain meaning of the language to give effect to the legislative intent." *Stromberg-Carlson Corp. v. State Tax Assessor*, 2001 ME 11, P.9, 765 A.2d 566. A statute's plain meaning must be considered through the lens of "the whole statutory scheme for which the section at issue forms a part so [***35] that a harmonious result, presumably the intent of the Legislature, may be achieved." *Id.* (quotation marks omitted). To give effect to the intent of the Legislature, "[w]ords must be given meaning and not treated as meaningless and superfluous." *Id.*

[*P46] The question before us is what it means for a landlord to refuse to rent to a tenant "primarily because of" the tenant's status as a recipient of public assistance pursuant to section 4582. The Court's holding—that "primarily because of," on its face, only prohibits housing decisions that are intentionally discriminatory—misreads the statute. Whether a housing decision is "primarily because of" a tenant's protected status can mean either (1) that the decision had a discriminatory purpose, or (2) that the decision resulted in a disparate impact on members of a protected group that was *functionally equivalent* to intentional discrimination. "[T]he necessary premise of the disparate impact approach is that some [housing] practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1250-51 (10th Cir. 1995) [***36] (quoting [**67] *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988)) (second alteration in original). This construction accords with the Supreme Court's adoption of disparate impact liability in the face of statutory language that, as is true here, does not explicitly mention disparate impact liability. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-36, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971) (holding that disparate impact liability is contemplated by Title VII's prohibition on employment tests that are "designed, intended or used to discriminate because of race") (quoting the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(h), 78 Stat. 241, 257 (codified as amended at 42 U.S.C.A. § 2000e-2 (West, Westlaw through P.L. 113-65 (excluding P.L. 113-54) approved 12-20-13))).

[*P47] This construction of section 4582 is confirmed by viewing it in conjunction with the business necessity

defense established in section 4583. Section 4583 dictates that the MHRA must be construed to permit housing practices that are both (1) "consistent with business necessity" and (2) "not based on" an individual's status as a member of a protected class, including recipients of public assistance:

Nothing in this Act may be construed to prohibit [***37] or limit the exercise of the privilege of every person and the agent of any person having the right to sell, rent, lease or manage a housing accommodation to set up and enforce specifications in the selling, renting, leasing or letting . . . of facilities . . . that are consistent with business necessity and are not based on the race, color, sex, sexual orientation, physical or mental disability, religion, country of ancestral origin or familial status of or the receipt of public assistance payments by any prospective or actual purchaser, lessee, tenant or occupant.

5 M.R.S. § 4583. Section 4583 creates a defense to liability pursuant to the MHRA that is relevant only if a housing decision is "not based on" a protected status, i.e., if the decision is not purposefully discriminatory but nonetheless has a disparate impact on a protected class. The business necessity defense is specifically tailored to defending against claims of disparate impact liability. See *Me. Human Rights Comm'n v. Can. Pac. Ltd.*, 458 A.2d 1225, 1233 n.16 (Me. 1983) ("[The business necessity defense] is thus available only to validate uniform employment criteria having a discriminatorily disparate impact."); *Me. Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1264-66 (Me. 1979) [***38] (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425-34, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975), and *Griggs*, 401 U.S. at 431, for the proposition that a plaintiff's prima facie case of disparate impact may be countered by a showing of business necessity). Thus, a facially neutral housing practice that has a disparate impact on a protected group is not discriminatory if it is "consistent with business necessity." 5 M.R.S. § 4583.

[*P48] Any doubt as to the proper construction of sections 4582 and 4583 is erased by the statute's legislative history.⁸ [**68] The 2007 amendment to the MHRA that, among other things, added the "business necessity" language to section 4583 expressly states

⁸ The majority concludes that 5 M.R.S. § 4582 (2007) unambiguously precludes disparate impact liability, and accordingly excludes 5 M.R.S. § 4583 (2007)'s legislative history from its analysis. This construction of section 4582 conflicts with the

that it "amends the Maine Human Rights Act to . . . prohibit unreasonable housing practices that have a disparate impact on the basis of . . . the receipt of public assistance payments." L.D. 685, Summary (123rd Legis. 2007); P.L. 2007, ch. 243, § 4 (effective Sept. 20, 2007) (codified at 5 M.R.S. § 4583 (2012)). The Legislature's intent to subject claims of housing discrimination based on the receipt of public assistance payments to disparate impact analysis, and to permit landlords to justify their practices based on a showing of business necessity, [***39] could not be clearer.⁹

2. The MHRA's Recognition of Disparate Impact Liability Does Not Make Participation in Section 8 Mandatory

[*P49] I agree with the Court that the MHRA does not make landlords' participation in the Section 8 housing voucher program mandatory. Nothing in the construction of the MHRA set out above requires landlords to participate in the Section 8 program. Rather, the statute simply prohibits landlords from discriminating, either in word or in effect, against recipients of public assistance. The Legislature's provision for these two forms of liability

cannot be properly understood as making participation in Section 8 mandatory.

[*P50] The concurrence, in arguing that the MHRA does not compel participation in Section 8, places significant weight on the fact that in 2007 the Judiciary Committee struck a proposed amendment to 5 M.R.S. § 4582 that would have made it unlawful for landlords [***41] to refuse to rent or impose different terms of tenancy to any recipient of public assistance "primarily because of the individual's status as recipient or because of any requirement of such a public assistance program." See L.D. 685 (123rd Legis. 2007); Comm. Amend. A to L.D. 685, No. S-162 (123rd Legis. 2007). The legislative history is silent as to why the Judiciary Committee decided to remove the proposed language from the enacted law, and any number of inferences can be drawn from the Committee's decision.¹⁰ Further, this 2007 amendment to [**69] the MHRA is the very same one cited above that demonstrates the Judiciary Committee's desire, in no uncertain terms, to subject unreasonable housing practices to disparate impact liability. See L.D. 685, Summary (123rd Legis. 2007).

business necessity defense—a defense specifically tailored to defend against claims of disparate impact liability—established by section 4583. At the very least, there exists ambiguity in the statute that requires consultation of the relevant legislative history. Because the "primary purpose in statutory interpretation is to give effect to the intent of the Legislature," *Arsenault v. Sec'y of State*, 2006 ME 111, P 11, 905 A.2d 285, the proper construction of the statute must recognize that the Legislature expressly provided that the business necessity defense is available to defend against disparate impact claims based on "the receipt of public assistance payments by any prospective or actual purchaser, lessee, tenant or occupant." 5 M.R.S. § 4583.

⁹ The Court's assertion that the Legislature "would have effectively overruled our holding in *Catir*" by creating disparate impact liability pursuant to section 4582 is incorrect. [***40] See Court's Opinion P 28. As discussed above, our holding in *Catir* was sufficiently distinguishable—and cursory—that the Legislature's contemplation of disparate impact liability in section 4582 did not infringe upon our holding in that case. See *Catir v. Comm'r of Dep't of Human Servs.*, 543 A.2d 356, 357-58 (Me. 1988).

¹⁰ It is important to note that Section 8 housing assistance is one of many "federal, state or local assistance" programs to which former section 4582 applied. Therefore, one interpretation of the Judiciary Committee's decision not to adopt the proposed change to section 4582 is that it was concerned about the consequences the change might have with respect to public assistance programs other than Section 8. The Judiciary [***42] Committee might also have concluded that the separate provision for disparate impact liability in L.D. 685, pursuant to section 4583, was sufficient to ameliorate concerns regarding landlords refusing to rent to tenants because of the requirements of participating in the Section 8 program. See Letter from Maine Human Rights Commission to Members of Joint Standing Committee on Judiciary 2 (April 5, 2007) (proposing amending section 4582 in order to "ensure that a housing provider cannot refuse to rent or impose different terms of tenancy because of the requirements of a public assistance program"). Finally, the Judiciary Committee might have concluded that the proposed amendment to section 4582 to add "any requirement of such a public assistance program" was not needed because a refusal to rent or imposition of different tenancy terms on that basis was already encompassed by the existing statutory language, "primarily because of the individual's status as recipient." The letter of the Executive Director of the Maine Human Rights Commission addressed to the Judiciary Committee that accompanied L.D. 685 suggested this very possibility. See Letter from Maine Human Rights Commission to [***43] Members of Joint Standing Committee on Judiciary 2 (April 5, 2007) (noting that the "recurring problem [of] landlords arguing that they do not want to do paperwork or comply with other requirements of public assistance programs such as Section 8 . . . arguably would violate the existing language" of section 4582).

3. Federal Law Supports an Interpretation of Section 4582 that Creates Disparate Impact Liability

[*P51] A construction of sections 4582 and 4583 that recognizes disparate impact liability is also supported by federal law. "In enacting the Human Rights Act, Maine was legislating against the background of prior federal antidiscrimination statutes and a developing body of case law construing and applying those statutes." City of Auburn, 408 A.2d at 1261 (footnote omitted). Accordingly, we look to federal case law to "provide significant guidance in the construction of our statute." *Id.* (quoting Me. Human Rights Comm'n v. Local 1361, 383 A.2d 369, 375 (Me. 1978)).

[*P52] The federal counterpart to the MHRA's fair housing provisions is the Fair Housing Act (FHA), 42 U.S.C.A. §§ 3601-3631 (West, Westlaw through P.L. 113-65 (excluding P.L. 113-54) approved 12-20-13). The FHA provides that "it [***44] shall be unlawful . . . [t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person *because of* race, color, religion, sex, familial status, or national origin." *Id.* § 3604(a) (emphasis added). Even though the words "because of" can be read to suggest solely intentional discrimination, every federal court of appeals but one has concluded that this FHA provision creates liability for intent-neutral disparate impact. See, e.g., Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly, 658 F.3d 375, 381-82 (3d Cir. 2011); Gallagher v. Magner, 619 F.3d 823, 833-38 (8th Cir. 2010); Reinhart v. Lincoln Cnty., 482 F.3d 1225, 1229 (10th Cir. 2007); Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565, 573 (2d Cir. 2003); Langlois v. Abington Hous. Auth., 207 F.3d 43, 49 (1st Cir. 2000); Gamble v. City of Escondido, 104 F.3d 300, 304-05 (9th Cir. 1997); Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996); Smith & Lee Assocs., Inc. v. City of Taylor, 102 F.3d 781, 790 (6th Cir. 1996); Knapp v. Eagle Prop. Mgmt. Corp., 54 F.3d 1272, 1280 (7th Cir. 1995); Jackson v. Okaloosa Cnty., 21 F.3d 1531, 1543 (11th Cir. 1994); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 986 (4th Cir. 1984). [***45] *But see* Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. and Urban Dev., 639 F.3d 1078, 1085, 395 U.S. App. D.C. 67 (D.C. Cir. 2011) (declining to decide whether the FHA permits disparate impact claims as to grant administration, but assuming that it does). The nearly unified view of the federal courts further supports the construction of sections 4582 and 4583 that recognizes disparate impact liability in housing discrimination. See City of Auburn, 408 A.2d at 1261.

[**70] C. Summary Judgment

[*P53] Because sections 4582 and 4583 recognize disparate impact liability, it is necessary to review the grant of summary judgment in favor of Coach Lantern on Dussault's claim of disparate impact.

[*P54] In analyzing a claim of disparate impact, courts employ a burden-shifting analysis similar to that employed when analyzing a claim of disparate treatment. See City of Auburn, 408 A.2d at 1264-65 (adopting this analysis in the employment discrimination context); see also Mountain Side Mobile Estates P'ship, 56 F.3d at 1250-54; Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 935-39 (2d Cir. 1988), *aff'd per curiam on other grounds, 488 U.S. 15, 18, 109 S. Ct. 276, 102 L. Ed. 2d 180 (1988)*. The first step of the analysis requires the party [***46] alleging discrimination to provide prima facie evidence that a facially neutral practice affects one group more harshly than another. City of Auburn, 408 A.2d at 1264. If the plaintiff produces a prima facie case, the burden of production shifts to the defendant to produce "credible evidence" of a genuine business necessity for the challenged practice. Id. at 1264-66. If the defendant meets that burden, the burden shifts back to the plaintiff to "show that the defendant was using his selection device as a pretext for discrimination." Id. at 1268 (quotation marks omitted). At all times, the ultimate burden of persuasion rests with the plaintiff. Id. at 1265.

[*P55] Here, Dussault satisfies the first step of the analysis: Coach Lantern's refusal to include the HUD tenancy addendum in its leases effectively excludes one hundred percent of Section 8 recipients from renting from Coach Lantern. See 24 C.F.R. § 982.308(b)(2) (2013) (requiring inclusion of HUD-prescribed addenda on all leases). As we have said in the employment setting, where the "inexorable zero" exists, "the prima facie inference of discrimination becomes strong." City of Auburn, 408 A.2d at 1264 (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 342 n.23, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977)). [***47] Because Dussault presented prima facie proof of discrimination, the burden shifted to Coach Lantern to produce evidence that its decision to not include the HUD tenancy addendum in its leases was justified by "credible evidence" of business necessity. Id. at 1265. This presents the question of what constitutes a "business necessity" pursuant to section 4583.

[*P56] The idea that a business necessity can justify a practice having a disparate impact on a protected class

originated in the context of federal employment discrimination law. See *Griggs*, 401 U.S. at 431. Federal courts have developed definitions of "business necessity" that inform the meaning of the term within the context of housing discrimination law. See, e.g., *Mountain Side Mobile Estates P'ship*, 56 F.3d at 1254. Similarly, our employment discrimination case law provides guidance as to what should constitute a "business necessity" for purposes of *section 4583*.¹¹ In the employment discrimination [**71] context, we have interpreted "business necessity" to require, among other things, that an employment practice be "necessary to safe and efficient job performance," and not be done out of "mere business convenience." *City of Auburn*, [**72] 408 A.2d at 1265 [***48] (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (1977)). In other words, the challenged practice must be shown by "credible evidence," *id.*, to be necessary to achieve a lawful and substantial nondiscriminatory interest of the defendant. This approach is consistent with that taken in the federal rule recently adopted to implement the FHA's discriminatory effects standard. See *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11,460, 11,482 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100). Applying this approach to *section 4583*, a business necessity is established when the challenged housing practice is not based on a protected status, and credible evidence demonstrates that the practice is necessary to achieve a "substantial, legitimate, nondiscriminatory interest" of the defendant. *Id.* at 11,460.

[*P57] Here, Coach Lantern's statement of material facts listed nine requirements of the HUD tenancy addendum that it finds objectionable. It then asserted, in paragraph 25, that "Coach Lantern is unwilling to attach the [Section 8] Addendum to any of its leases because of the number of burdensome conditions contained therein and the fact that the Addendum alters a landlord's rights under state law." Although Coach Lantern summarized the conditions of the addendum that it objects to, it failed to assert facts from which a fact-finder could determine that the conditions would

interfere with any substantial, legitimate, and nondiscriminatory interest associated with its business. Coach Lantern did not identify which addendum provisions differed from its own lease provisions, and it further failed to include a copy of its standard lease in the summary judgment [***50] record. Because of this, it is impossible to identify the actual differences between Coach Lantern's lease agreement and the Section 8 addendum. Similarly, Coach Lantern failed to identify which of its rights pursuant to state law would be altered if it were bound by a Section 8 addendum and the extent to which the alteration of those rights would interfere with the safe and efficient operation of its business.

[*P58] Contrary to the Court's approach, whether a housing practice qualifies as a business necessity is a fact-intensive issue that the law requires the landlord to prove by credible evidence, not simply allege. Where the proffered justification for a landlord's housing practice (here, Coach Lantern's assertion that provisions of the HUD tenancy addendum are unduly onerous) applies exclusively and completely to a class of individuals who share a status protected by the MHRRA (here, Dussault and all other recipients of Section 8 housing subsidies), only a fact-finder can determine whether the housing practice in fact qualifies as a business necessity and is not based on the individuals' protected status. Coach Lantern's statement of material facts does no more than assert that it objects [***51] to certain requirements of the addendum without offering any information from which a fact-finder could determine whether Coach Lantern's objection is based on "mere business convenience" or an actual business necessity. One can only speculate, for example, whether Coach Lantern will incur increased operating expenses if it adopts the addendum, and, if so, whether the increased expenses will be sufficiently substantial as to jeopardize the "safe and efficient" operation of its rental business. *City of Auburn*, 408 A.2d at 1265 (quotation marks omitted).

[*P59] Accordingly, Coach Lantern did not meet its burden of showing that an actual business necessity justified its decision to refuse to include Section 8

¹¹ At least one commentator has argued that although the definitions of "business necessity" created in employment law tend to inform the definitions adopted in housing law, housing law should apply a stricter standard. See Lindsey E. Sacher, Note, *Through the Looking Glass and Beyond: The Future of Disparate Impact Doctrine Under Title VIII*, 61 Case W. Res. L. Rev. 603, 636 (2010) [***49] ("[T]he differences between housing and employment suggest that given the limited number of legitimate justifications for denying housing to a qualified applicant, [housing discrimination] defendants should bear a higher burden than [employment discrimination defendants] when seeking to rebut a prima facie case of disparate impact.").

addenda in its lease agreements. Because Dussault made an un rebutted prima facie case of disparate impact discrimination, her motion for summary judgment should have been granted and Coach Lantern's motion for summary judgment should have been denied. See *Mountain Side Mobile Estates P'ship*, 56 F.3d at 1254.

C. Conclusion

[*P60] With certain exceptions not applicable here, Maine landlords are required to comply with the Maine Human Rights Act. The Act does not compel landlords to participate in [***52] the Section 8 housing voucher

program so long as the landlord's decision does not intentionally discriminate against, or result in a disparate impact on, recipients of public assistance. If a landlord's refusal to rent to recipients of public assistance has a disparate impact on such individuals, the landlord must have a legitimate, non-discriminatory reason—"business necessity"—for doing so. 5 M.R.S. § 4583. Because Dussault made an un rebutted prima facie case of discrimination based on Coach Lantern's refusal to rent to her, I would vacate the judgment and remand for entry of a judgment in favor of Dussault and for a determination of her remedies.

Sherman v. American Cyanamid Co.

United States Court of Appeals for the Sixth Circuit

September 1, 1999, Filed

No. 98-4035

Reporter

1999 U.S. App. LEXIS 21086; 82 Fair Empl. Prac. Cas. (BNA) 768

CARYL M. SHERMAN, Plaintiff-Appellant, v.
AMERICAN CYANAMID COMPANY,
Defendant-Appellee.

Civil Procedure > ... > Summary Judgment > Entitlement
as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting
Materials > General Overview

Notice: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 206 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 206 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

HN2 Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).

Subsequent History: Reported in Table Case Format at: 1999 U.S. App. LEXIS 28248. Certiorari Denied March 27, 2000, Reported at: 2000 U.S. LEXIS 2218.

Labor & Employment Law > Discrimination > General
Overview

Labor & Employment Law > ... > Age Discrimination >
Discriminatory Employment Practices > General Overview

Prior History: On Appeal from the United States District Court for the Northern District of Ohio. 97-00185. Gwin. 7-28-98.

HN3 The Age Discrimination in Employment Act prohibits employers from discriminating against any individual with respect to compensation, terms, conditions, or privileges of employment because of the person's age. 29 U.S.C.S. § 623(a).

Disposition: AFFIRMED.

LexisNexis® Headnotes

Evidence > Burdens of Proof > Burdens of Production

Civil Procedure > Appeals > Summary Judgment Review >
General Overview

Labor & Employment Law > Discrimination > General
Overview

Civil Procedure > Appeals > Summary Judgment Review >
Standards of Review

Labor & Employment Law > Discrimination > Age
Discrimination > General Overview

Civil Procedure > Appeals > Standards of Review > De
Novo Review

Labor & Employment Law > ... > Age Discrimination >
Evidence > Burdens of Proof

HN1 When reviewing a district court's grant of summary judgment, the appellate court conducts a de novo review.

Civil Procedure > ... > Discovery > Methods of Discovery >
General Overview

HN4 Where there is no direct evidence of discrimination, the court analyzes cases brought under the Age Discrimination in Employment Act, 29 U.S.C.S. § 621 et seq., under the familiar three-step McDonnell Douglas framework, where first, the plaintiff must present evidence sufficient to establish a prima facie case. Once she has done so, the burden of production shifts to the defendant to articulate a legitimate nondiscriminatory reason for the adverse employment action. Finally, the burden is on the plaintiff to show that

Civil Procedure > ... > Summary Judgment > Entitlement
as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement
as Matter of Law > Genuine Disputes

the employer's nondiscriminatory explanation is mere pretext for intentional age discrimination.

Labor & Employment Law > Discrimination > General Overview

Labor & Employment Law > Discrimination > Age Discrimination > General Overview

Labor & Employment Law > ... > Age Discrimination > Discriminatory Employment Practices > Reductions in Force

HN5 When an employer terminates an employee because of a reduction in force or a reorganization, a prima facie case of age discrimination can be established by showing that: (1) the plaintiff was forty years old or older at the time of her dismissal; (2) that she was qualified for the position; (3) that she was discharged; and (4) additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons. This fourth element is met if the employee can demonstrate that comparable employees not in the protected group were treated more favorably, or if there is other circumstantial or statistical evidence supporting an inference of discrimination.

Labor & Employment Law > Discrimination > Age Discrimination > General Overview

HN6 To be deemed "similarly-situated," the individuals with whom the plaintiff seeks to compare his/her treatment 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.

Labor & Employment Law > Discrimination > Age Discrimination > General Overview

HN7 The plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered "similarly-situated;" rather, the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in all of the relevant aspects.

Labor & Employment Law > Discrimination > Age Discrimination > General Overview

HN8 Common sense suggests that when an employer harboring age-discriminatory animus eliminates several employees' positions, its decision to transfer its younger

workers to new positions while denying its older workers the same opportunity irrespective of past differences in their particular job functions may reflect proscribed age bias.

Labor & Employment Law > Discrimination > General Overview

Labor & Employment Law > Discrimination > Age Discrimination > ADEA Enforcement

HN9 Once a prima facie case of age discrimination in employment is established, and the defendant has articulated a legitimate, nondiscriminatory reason for its actions, the plaintiff must prove that the employer's explanation was mere pretext for discrimination. To do so, the plaintiff is required to prove that either: (1) the proffered reason had no basis in fact, (2) the proffered reason did not actually motivate the discharge; or (3) the reason was insufficient to motivate discharge.

Governments > Courts > Court Personnel

Labor & Employment Law > ... > Age Discrimination > Discriminatory Employment Practices > General Overview

Labor & Employment Law > Discrimination > Age Discrimination > ADEA Enforcement

HN10 In assessing the relevancy of a discriminatory remark in an age discrimination in employment case, the court first looks to the identity of the speaker, and whether the speaker is the one responsible for making personnel decisions. The court must then consider the substance of the remarks in determining their relevancy to a plaintiff's claim that an impermissible factor motivated the adverse decision to determine whether the remarks were too isolated or ambiguous to support a finding of age discrimination. In addition, the court must look to the nexus, if any, between the remarks and the adverse action, although the absence of a direct nexus does not necessarily render a discriminatory remark irrelevant. Finally, each remark should not be viewed in isolation; instead, the court should be mindful that the remarks buttress one another as well as any other pretextual evidence supporting an inference of discriminatory animus.

Counsel: For CARYL M SHERMAN, Plaintiff - Appellant: Robert S. Bauders, Law Office of Robert S. Bauders, Cleveland, OH.

For AMERICAN CYANAMID COMPANY, Defendant - Appellee: Sue M. Douglas, Stephen C. Sutton, Millisor & Nobil, Cleveland, OH.

Judges: BEFORE: KEITH, and RYAN, Circuit Judges; HULL, District Judge.

Opinion by: RYAN

Opinion

RYAN, Circuit Judge. Plaintiff Caryl M. Sherman sued her former employer, American Cyanamid, for age discrimination, pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq.; for sex discrimination, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and for the combination of sex plus age discrimination. The defendant's [*2] motion for summary judgment was granted and the plaintiff appealed, asking us to recognize a new cause of action for sex plus age discrimination, or discrimination against "older women." We decline the invitation to decide the issue, partly because it is unnecessary for us to do so. Assuming Sherman made out a *prima facie* case for such a claim, she nevertheless was not able to establish that the defendant's reason for discharging her (a reduction in work force) was pretextual. Accordingly, we will affirm the district court's judgment.

I.

Sherman worked for American Cyanamid in various positions for over 20 years. In 1992, she was assigned to the company's Lederle division as a pharmaceutical sales representative. The defendant claims that Sherman's performance in this position was below average. She ranked among the lowest of the sales force in several rankings, and every supervisor who worked with Sherman criticized her for not following the company policy regarding "closing" the sale with the customer. These criticisms were well-documented.

In 1994, when the defendant restructured its sales force, it changed the boundaries of several territories, and decided to eliminate [*3] five territories, and therefore, five sales representatives. Sherman, who was 50 years old at the time, was one of the five representatives discharged. She claims that two younger women were transferred into her territory, which was in the Cleveland area, but the evidence indicated that the restructuring caused Sherman's territory to be eliminated. The defendant claims that the employees retained were more qualified and were better sales representatives than the plaintiff. Sherman claims that one of the younger employees, Dee Dee Kvassay, did

not perform as well as Sherman did on some of the sales quotas and rankings. The defendant concedes this is so, but claims that Kvassay performed better than Sherman on key products. It also claims that Kvassay was a new employee and every supervisor stated that she had the potential to succeed, and was great at closing sales.

The district court granted the defendant's motion for summary judgment, holding that Sherman could not establish a *prima facie* case for any of her claims because she could not establish that she was similarly situated to any of the employees who were retained. Because there were differences in some of the rankings Sherman [*4] was given, as compared to other employees, the court held that Sherman was not similarly situated to the other employees. The court also held that even if Sherman could establish a *prima facie* case for any of her claims, she had not shown that the defendant's legitimate, nondiscriminatory reason for firing her was pretextual. The court entered summary judgment for the defendant. This appeal followed, with the plaintiff disputing the district court's conclusion regarding plaintiff's age discrimination claim, and her discrimination claim based on her status as an "older woman."

II.

HN1 When reviewing a district court's grant of summary judgment, we conduct a *de novo* review. See Whisman v. Robbins, 55 F.3d 1140, 1143 (6th Cir. 1995). **HN2** Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. Civ. P. 56(c).

A.

We will first address the plaintiff's age discrimination claim. **HN3** The ADEA prohibits employers from discriminating [*5] against any individual with respect to compensation, terms, conditions, or privileges of employment because of the person's age. See 29 U.S.C. § 623(a). **HN4** Where there is no direct evidence of discrimination, we analyze ADEA cases under the familiar three-step *McDonnell Douglas* framework, where first, the plaintiff must present evidence sufficient to establish a *prima facie* case. Once she has done so, the burden of production shifts to the defendant to

articulate a legitimate nondiscriminatory reason for the adverse employment action. Finally, the burden is on the plaintiff to show that the employer's nondiscriminatory explanation is mere pretext for intentional age discrimination. See Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 350 (6th Cir. 1998).

HN5 When an employer terminates an employee because of a reduction in force or a reorganization, a *prima facie* case can be established by showing that: (1) the plaintiff was forty years old or older at the time of her dismissal; (2) that she was qualified for the position; (3) that she was discharged; and (4) "additional direct, circumstantial, or statistical evidence tending [*6] to indicate that the employer signaled out the plaintiff for discharge for impermissible reasons." Ercegovich, 154 F.3d at 350 (citation omitted). This fourth element is met if the employee can demonstrate that comparable employees not in the protected group were treated more favorably, or if there is other circumstantial or statistical evidence supporting an inference of discrimination. See *id.*

The defendant and the district court seemed to assume that employees had to have exact rankings and sales for them to be similarly situated. Indeed, in Mitchell v. Toledo Hospital, 964 F.2d 577, 583 (6th Cir. 1992), this court stated that the plaintiff must show that the comparables are similarly situated in all respects. In that case, an employee was fired for bad behavior. The court stated the rule of the case, as follows:

HN6 Thus, to be deemed "similarly-situated," the individuals with whom the plaintiff seeks to compare his/her treatment 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 [*7] or the employer's treatment of them for it.

Id. at 583.

In Ercegovich, the district court, applying Mitchell, stated that Ercegovich was not similarly situated to other employees who were allowed to transfer jobs because the other employees performed different job functions. This court, reversing, stated that the "district court misconstrued this circuit's precedent in applying an exceedingly narrow reading of the Mitchell decision."

Ercegovich, 154 F.3d at 352. Our decision continued by explaining that Mitchell relied on factors relevant to the factual context in which the case arose--an allegedly discriminatory disciplinary action resulting in the termination of the plaintiff's employment. The same factors will generally be relevant in other cases alleging differential disciplinary action. See *id.* This court then stated:

Courts should not assume, however, that the specific factors discussed in Mitchell are relevant factors in cases arising under different circumstances, but should make an independent determination as to the relevancy of a particular aspect of the plaintiff's employment status and that of the [*8] non-protected employee. **HN7** The plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered "similarly-situated;" rather, as this court has held in Pierce, the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in "all of the relevant aspects."

Id. (citation omitted).

Applying this rule in Ercegovich, this court stated that it did not matter that Ercegovich did not perform the same job activities as those employees to which he sought to compare himself. It was sufficient that the positions held by all three employees were related to human resources functions, and all three positions were eliminated before the other two employees were transferred; therefore, the plaintiff had met the similarly situated test. The court stated: **HN8** "Common sense suggests that when an employer harboring age-discriminatory animus eliminates several employees' positions, its decision to transfer its younger workers to new positions while denying its older workers the same opportunity irrespective of past differences in their particular job functions may reflect [*9] proscribed age bias." 154 F.3d at 353.

In light of Ercegovich, we disagree with the district court that the plaintiff and those individuals to whom she was compared, the younger sales representatives, were not similarly situated. They were similar in all relevant aspects. There were some rankings where Sherman was higher, and some rankings where the younger employees performed better. The defendant argues

that it has the right to make business judgments regarding who will be a better employee without interference from this appellate court. This is true, and it leads to the conclusion that the defendant had a legitimate, nondiscriminatory reason for its decision, not to the conclusion that the employees were not similarly situated for the *prima facie* case analysis. Accordingly, while we believe that the plaintiff has established a *prima facie* case, we also think that the defendant has articulated a legitimate business reason for its decision. Management certainly has the right to act upon "gut feelings" about which employee is going to perform better; a long-time employee who has been having a great many problems and is unwilling or unable to close a sale properly, [*10] or a new employee who appears to have a great deal of potential to succeed as a sales representative.

HN9 Once a *prima facie* case is established, and the defendant has articulated a legitimate, nondiscriminatory reason for its actions, the plaintiff must prove that the employer's explanation was mere pretext for discrimination. To do so, the plaintiff is required to prove that either: (1) the proffered reason had no basis in fact, (2) the proffered reason did not actually motivate the discharge; or (3) the reason was insufficient to motivate discharge. See Manzer v. Diamond Shamrock Chem. Co., 29 F.3d 1078, 1084 (6th Cir. 1994). The type of pretext the plaintiff attempted to establish here is the second one: that circumstances tend to prove that an illegal motivation was more likely than the motivation offered by the defendant. The plaintiff must argue that "the sheer weight of the circumstantial evidence of discrimination makes it 'more likely than not' that the employer's explanation is a pretext, or coverup." *Id.*

The only evidence to which the plaintiff can arguably point are two comments by her supervisor, Tom Flippen, who was the manager responsible for [*11] the termination decisions. One comment was that Sherman made a great deal of money for a pharmaceutical representative. The other comment was made to Jill Wise, a district manager. Apparently, Flippen was discussing with Wise a male candidate who was "older." Flippen stated that he did not like the candidate because he thought it would be difficult to work with an older candidate. He also stated something to the effect that you cannot teach an old dog new tricks.

The *Ercegovich* case discussed the issue of when allegedly age-biased statements prove pretext. In that

case, there were remarks by one of the managers that "this company is being run by white haired old men waiting to retire, and this has to change," and a comment that the manager did "not want any employee over 50 years old on his staff." Ercegovich, 154 F.3d at 355. These comments were enough to raise a jury issue regarding the employer's motive for firing *Ercegovich*, even though they were not made by the manager in charge of terminating *Ercegovich*. It is clear that these comments are more inflammatory than the alleged comments made in this case, but the *Ercegovich* case sets forth several [*12] rules for analyzing the effect of age-biased comments. See id. at 354.

HN10 In assessing the relevancy of a discriminatory remark, the court first looks to the identity of the speaker, and whether the speaker is the one responsible for making personnel decisions. See *id.* The court must then consider the substance of the remarks in determining their relevancy to a plaintiff's claim that an impermissible factor motivated the adverse decision to determine whether the remarks were too isolated or ambiguous to support a finding of age discrimination. See id. at 355. In addition, the court must look to the nexus, if any, between the remarks and the adverse action, although the absence of a direct nexus does not necessarily render a discriminatory remark irrelevant. See *id.* Finally, each remark should not be viewed in isolation; instead, the court should be mindful that the remarks buttress one another as well as any other pretextual evidence supporting an inference of discriminatory animus. See id. at 356. In summation, this court stated:

We do not mean to imply that any ageist comment by a corporate executive is relevant as evidence [*13] of a discriminatory corporate culture. Rather, the courts must carefully evaluate factors affecting the statement's probative value, such as "the declarant's position in the corporate hierarchy, the purpose and content of the statement, and the temporal connection between the statement and the challenged employment action," as well as whether the statement buttresses other evidence of pretext.

Id. at 357 (citations omitted).

In light of these rules of analysis, we are left with the firm conclusion that the plaintiff has not established pretext in this case. There is no direct nexus between Flippen's

comments and Sherman's termination. Furthermore, the comment regarding Sherman making a great deal of money was ambiguous, and the other comment concerning the older male employee is not sufficient to allow us to reach the conclusion that the "sheer weight of the circumstantial evidence of discrimination makes it 'more likely than not' that the employer's explanation is a pretext, or coverup." Manzer, 29 F.3d at 1084. Therefore, we affirm the district court's judgment on Sherman's age discrimination claim

B.

Regarding the plaintiff's claim [*14] that she was discriminated against as an "older women" and that this court should recognize a separate cause of action for "sex plus age" discrimination, just as some of our sister circuits have recognized a "sex plus race"

discrimination, see, e.g., Jefferies v. Harris County Community Action Ass'n, 615 F.2d 1025 (5th Cir. 1980), we decline the plaintiff's invitation. First of all, no Federal Court of Appeals (including this one) nor the Supreme Court has recognized such a cause of action. Furthermore, assuming without deciding that we did recognize such a cause of action, and the plaintiff could establish a *prima facie* case, the plaintiff, for the reasons stated in the previous section, is unable to prove that the defendant's reason was pretextual. Accordingly, because deciding the issue will not change the result, we feel it is unwarranted for us to do so.

III.

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