UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT M. HAHN,

Plaintiff,

v.

JOSEPH M. GASPER, et al.,

Defendants.

CASE No. 1:20-CV-403

HON. ROBERT J. JONKER

and

MICHAEL A. CALDWELL,

Plaintiff,

v.

JOSEPH M. GASPER, et al.,

Defendants.
_____/

Case No. 1:20-CV-411

HON. ROBERT J. JONKER

OPINION AND ORDER

INTRODUCTION

These are two of three civil lawsuits brought by white male police officers against their employer, the Michigan State Police, and the director of the Michigan State Police, Joseph Gasper alleging that they were discriminated and retaliated against by Defendants on account of their race and gender and the complaints they made about unlawful race and gender preferences instituted by the Michigan State Police.[1] In these two cases both Plaintiffs assert they were subjected to

[1] The Court ordered that these two cases would proceed together given the overlapping legal theories and intermingled factual assertions. The third case, *McCormick v. Gasper*, Case No.

trumped up charges for their actions related to a hiring decision within the state police district they oversaw.

The matter is before the Court on the defense motions for summary judgment filed in both Hahn and Caldwell's cases. The Court heard argument on the motions on October 26, 2021, and thereafter took the matter under advisement. Plaintiffs plainly disagree as a policy matter with the priorities of the Michigan State Police. And at bottom, this is all they have shown. The main characters in this case are all white males. There is scant evidence that Director Gasper had any active involvement in Plaintiffs' disciplinary process. Moreover, Plaintiffs cannot point to a comparator to make out a prima facie case of reverse race and gender discrimination. Nor can they demonstrate the reasons underlying their respective disciplines were pretext for unlawful race and gender discrimination or that their discipline was retaliation for their complaints about the administration's diversity policies. Accordingly, for the reasons explained more fully below, the Court grants the defense motions and dismisses these two lawsuits.

FACTUAL BACKGROUND

Hahn and Caldwell have each served in the Michigan State Police for over thirty years. They became acquainted as recruits and eventually obtained leadership positions in the Michigan State Police's Seventh District, an area encompassing the northern counties of Michigan's lower peninsula. In 2019, Hahn held the title of Inspector, and he reported to Caldwell, who held the title of Captain. As leaders in the Seventh District, Hahn and Caldwell were both involved in the hiring process when vacancies for subordinate positions came up within the district. Captains like Caldwell were historically given some latitude in managing the hiring process, especially as it

1:20-cv-779 (W.D. Mich. 2020), has proceeded separately, although it too has common factual assertions.

related to lateral movements within the district. So, when Michael Bush, a white male, asked that Hahn and Caldwell approve his lateral transfer application within the district, Plaintiffs assert there was nothing out of the ordinary when they told Bush they would not support the request because they needed him in his current position. What followed, however, was a process that eventually led to Hahn's termination and Caldwell's demotion. Plaintiffs claim that their discipline was just one example of a policy and practice dating back several decades in the Michigan State Police that preferred racial and gender minorities over white males. They were disciplined, Plaintiffs argue, for speaking out about those discriminatory practices.

All this is Plaintiffs' position in brief. Below, the Court provides additional detail.

I. The Diversity Initiative and Hahn and Caldwell's Complaints

A. Defendant Gasper Institutes the "Diversity ONE" Initiative.

In January 2019, Defendant Gasper became the Director of the Michigan State Police when Governor Gretchen Whitmer succeeded Rick Snyder as Governor of Michigan. Plaintiffs allege that after taking office the new administration doubled down on a practice in the Michigan State Police dating back to the 1980s that maintained unlawful racial and gender minority preferences in the police force. Throughout the years the practice has been more overt than at others. In response to past litigation[2] and a State constitutional amendment in 2006, for example, Plaintiffs argue the preferences have become more nuanced. But make no mistake, Plaintiffs say, in practice the state police have, both past and present, unlawfully given preferences to racial and gender minorities in all aspects of employment.

[2] *See, e.g.*, *Herendeen v. Michigan State Police*, 39 F. Supp. 2d 899 (W.D. Mich. 1999).

Plaintiffs specifically allege that Defendant Gasper reinforced these past practices under a "diversity ONE initiative."[3] It began during a February 6, 2019, meeting, where Director Gasper commented that diversity would be the "number one priority" within the Michigan State Police. (Caldwell Sec. Am. Compl. ¶ 32, ECF No. 116, PageID.710-711). Then, in October 2019, Caldwell commented that the Michigan State Police was "way too white, and way too male" and announced that the Michigan State Police would diversify all ranks of the police force. He announced certain percentage targets for gender and racial minorities. As Caldwell and Hahn put it, the new diversity initiative had a negative impact on the morale of white male officers in the Michigan State Police. Not only did it effect hiring practices, but it also resulted in disparate treatment towards white male officers. Those officers were treated differently than other officers for engaging in similar conduct. It is against this backdrop that both Plaintiffs place themselves in the late summer and early fall of 2019.

B. Plaintiff Hahn's Complaints About a Comedy Sketch by a Minority Employee.

On August 29, 2019, Plaintiff Hahn attended the retirement party of a fellow employee. Sergeant Dwayne Gill, a moonlighting comedian, took the stage for an open-mic segment. During his routine, Sergeant Gill made several jokes with a racial or gender-based tinge that Hahn understood to be in violation of the Michigan State Police's Discrimination and Harassment Policy. (Hahn Sec. Am. Compl. ¶ 48, ECF No. 121, PageID.745).[4] Hahn assumed that the senior

[3] The record sometimes refers to this as "Diversity 1" or "Diversity 10.0." It is not clear from the summary judgment record if the initiative has been reduced to writing. The defense provides a "strategic plan" for the Michigan State Police that highlights some of the goals of the initiative, including a "key measure" setting out percentage targets for racial and gender minorities in the trooper applicant pool. (ECF No. 142-19).

[4] "Hahn ECF" refers to the docket in Hahn's case, *Hahn v. Gasper*, No. 1:20-cv-403. The docket in Caldwell's case, *Caldwell v. Gasper*, No. 1:20-cv-411, in turn, is referred to by using "Caldwell ECF." The summary judgment record in both case contains significant overlap.

members of the Michigan State Police who were in attendance would act on the matter, but after several days when no action had been taken, Hahn complained about the comments to Sergeant Gill's supervisor, Lisa Rish, "as he was duty bound by policy and his oath of office to do." (*Id.* at ¶ 50). Rish tried to dissuade Hahn from pursuing a complaint but Hahn pointed out that failing to investigate the matter would amount to a double standard in the application of the Michigan State Police's harassment policy. The senior members took no action, Hahn believed, because Sergeant Gill was a racial minority. Rish reluctantly agreed to investigate the matter.

Hahn also performed his own investigation. He viewed some of Sergeant Gill's comedy sketches on the internet and concluded that they also violated the Michigan State Police's Code of Conduct and its Discrimination and Harassment Policy. On September 13, 2019, Hahn sent Inspector Lisa Gee-Cram a link to one of the videos and copied Caldwell on the email. (Hahn ECF No. 1-5). Hahn remarked that the video was not "in step with the direction our department and society are trying to move[.]" (*Id.*). Approximately a week later, on September 19, 2019, Hahn spoke with Stephanie Horton, the Human Resources Director of the Michigan State Police about Gill's videos. She advised Hahn that his complaint to Lisa Rish was being sent up the chain of command. Ms. Rish also contacted Hahn and hold him that there would be an internal investigation of his complaint. (Hahn Sec. Am. Compl., ¶¶ 66-68, Hahn ECF No. 121, PageID.747).

C. Plaintiff Hahn and Caldwell Complain About the Diversity Initiative

A few weeks later, on October 8, 2019, Director Gasper held a fall forum event. At the forum, Director Gasper reiterated the comments he had made earlier that spring. Diversity was to be the number one priority of the state police. Gasper further commented that the police force was "way too white and way too male" and allegedly instituted a directive that the Michigan State

Police was to set aside 25% of positions for minorities and 20% for females. (Hahn. Sec. Am. Compl. ¶ 31, Hahn ECF No. 121, PageID.741; Caldwell Sec. Am. Compl. ¶ 39, Caldwell ECF No. 116, PageID.711).

The following day, Lt. Colonel Rick Arnold, a member of the leadership team working underneath Director Gasper, held a bureau meeting. Both Hahn and Caldwell were in attendance. At the beginning of the meeting, Arnold commented that the purpose of the meeting was to have a "difficult discussion" about the racial and gender preferences in the State police force. (Caldwell Sec. Am. Comp. ¶ 41, ECF No. 116, PageID.712). During the meeting, Arnold solicited feedback from the attendees. Plaintiff Caldwell spoke up and was blunt. He explained that the initiative would have a negative impact on white males in the police force under his command. He told Arnold that the term "white male" had taken a negative connotation in the state police. Caldwell asked how Director Gasper's public comments could foster an atmosphere of inclusion amongst those officers who were not racial or gender minorities. (Caldwell Decl. ¶¶ 10-14, Caldwell ECF No. 145-14, PageID.1268). Hahn spoke in favor of Caldwell's comments. He criticized the Michigan State Police's "hand-wringing over demographics" and commented that the initiative was an unwise response to false claims of institutional racism in the police force. (Hahn Decl. ¶ 15, Caldwell ECF No. 145-12, PageID.1259).

Both Hahn and Caldwell assert that following these comments, they became personas non grata at work. Other officers avoided them, especially when Director Gasper was present. (Caldwell Dep. 154-155, Hahn ECF No. 145-2, PageID.1170). And when, in January of 2020, Caldwell told Arnold that he supported Hahn's complaint about Sergeant Gill and communicated that he believed Hahn was being targeted for his complaint, Arnold responded that the two should do a better job of getting along with others. (Hahn ECF No. 145-2, PageID.1185).

II. The Lateral Transfer Request

A. Michigan State Police's New Hiring Policy and the Assistant Post Commander Opening

In August of 2019, the Michigan State Police instituted a new hiring policy for vacancies in higher level positions. Among other things, the policy directed that the vacancies for those positions would first have to be posted for lateral transfers only. The policy further required that "[t]he hiring manager *shall* hold an interview . . . to determine [the applicant's] qualifications, interest in the position, and job fit." (Hahn ECF No. 145-21, PageID.1292) (emphasis added). Only if there was no individual selected during this lateral stage could the vacancy be opened up for all applicants, including those interested in promotions.

On September 27, 2019, Hahn emailed Inspector Scott Marier requesting that a position for the Assistant Post Commander position in Gaylord, Michigan be posted for lateral or promotion applicants. (Hahn ECF No. 145-18, PageID.1276). The Assistant Post Commander position fell under the requirements of the new hiring policy but Hahn asked Marier whether they could forgo the lateral transfer stage and open the position for all applicants. But Lt. Colonel Arnold decided that the policy requiring the lateral transfer stage needed to be followed. (Hahn ECF No. 142-2, PageID.1014-1015).

Accordingly, the Assistant Post Commander position was posted on October 9, 2019, for employees interested in a lateral transfer.

B. Bush Applies for the Assistant Post Commander Position and is Told He Would Not be Selected.

After hearing of the opening, Dt./Lt. Michael Bush, a white male, emailed his supervisor, F/Lt. Belcher and expressed a desire to apply for the lateral transfer. Bush had been with the Michigan State Police for over twenty years and had recently been promoted to the position of

detective lieutenant serving as the Traverse Narcotics Team ("TNT") Commander, a position in the Seventh District. (Caldwell ECF No. 137-3, PageID.985-84). Applicants in the Michigan State Police interested in moving to a different position are required to obtain a recommendation from their superiors on an internal, PD-035, form. To move forward with the application, Bush asked Belcher to complete the required PD-035 recommendation form on his behalf.

In the following days, Bush discussed the position with Caldwell, Hahn, and Belcher. None of the individuals supported the transfer. Belcher told Bush he did not support the transfer because Bush had only recently been promoted to the narcotics team and he wanted Bush to stay in the position for the needs of that team. (Hahn ECF No. 145-18, PageID.1277). In a similar vein, Caldwell told Bush that he would not approve a transfer, and that Caldwell needed Bush to remain at TNT for "operational reasons." (Hahn ECF No. 145-18, PageID.1280). On October 15, 2019, Belcher completed the PD-035 form. Belcher did not recommend Bush for the position because he believed Bush had not been in the TNT position long enough to warrant the Assistant Post Commander position. (Caldwell ECF No. 137-4, PageID.989). The PD-035 form was forwarded to Human Resources.

C. Arnold Requires that Bush Be Given an Interview

Meanwhile, on October 14, 2019, Angela Fuqua with Human Resources sent an email to the hiring manager for the Assistant Post Commander position, F/Lt. Jason Nemecek. The email explained that Bush was the lone applicant for the position. Ms. Fuqua wrote that even though Bush was the only applicant, Nemecek was not obligated to move forward with Bush if Nemecek believed Bush was not qualified. Nemecek could also conduct an informal interview that might illuminate whether Bush was qualified for the position. (Hahn ECF No. 142-5, PageID.1029). To select Bush for the position, Nemecek was to complete a selection memo explaining that Bush was

the only applicant and addressing Bush's competencies and work experience. (*Id.*). At that time, Human Resources did not yet have Bush's completed PD-035 form. Ms. Fuqua indicated that the form, and other materials, would be forwarded along to Nemecek when they were received. On October 21, 2019, Nemecek followed up with Ms. Fuqua to ask when he might receive the rest of Bush's application. (ECF No. 142-7, PageID.1036). Ms. Fuqua initially responded that because Belcher did not recommend Bush for the position, Bush would be placed back in the queue. (*Id.*). But Stephanie Horton and Richard Arnold subsequently discussed Bush's application and concluded that Belcher's PD-035 non-recommendation was invalid because it was based on Bush's lack of time in his current position, and not his performance. There was, Arnold decided, no requirement that personnel spend a specific amount of time in a position before applying for a transfer. (Hahn ECF No. 142-2, PageID.1015).

Arnold called Caldwell and told him that under the new policy, Bush needed to be given an interview. It was important, he said, that the policy be followed. (Arnold Dep. 93, Hahn ECF No. 142-8, PageID.1039). Caldwell bristled at the interference in the process and told Arnold that unless Arnold or Director Gasper overruled him, he was going to deny the transfer. Arnold assured Caldwell that he would not overrule the interview panel. (Arnold Dep. 87, Hahn ECF No. 145-7, PageID.1229). Caldwell described Arnold's instructions as to "go through the motions" of the new lateral transfer policy. (Caldwell Dep. 39, Hahn ECF 145-2, PageID.1158).

D. Nemecek and Connie Swander Interview Bush and Select Him for the Position

Following the call with Arnold, Caldwell spoke with Nemecek about interviewing Bush. Consistent with Arnold's directions, Caldwell told Nemecek that he needed to convene an interview panel and interview Bush. But Caldwell emphasized to Nemecek that this was only so

as to "go through the motions" of the new policy. Regardless of any interview, Caldwell said, he would not approve the transfer. (Hahn ECF No. 145-18, PageID.1280-1281).

On October 28, 2019, Nemecek and Connie Swander interviewed Bush for the Gaylord post. Bush was asked five questions, and Nemecek found that Bush gave "very clear and concise answers." (Caldwell ECF No. 137-2, PageID.968). The interviewers also scored Bush using a "PD-011" form, which was an interview evaluation grid. The evaluation form was a tool used for some interviews, but it was not listed as a required form in the email that Ms. Fuqua had sent Nemecek. And Hahn was emphatic that he never directed Nemecek to use the PD-011 form during the interview. Nevertheless, Nemecek and Swander completed the form for Bush and scored Bush at 52 out of 60 points, reflecting a high score. Both Nemecek and Swander signed the form, indicating they agreed to the listed scores. (Hahn ECF No. 142-9, PageID.1041).

E. Hahn and Caldwell Direct Nemecek to Review the Selection

The PD-011 form, and a memo indicating Bush had been selected for the Assistant Post Commander position, were forwarded to Hahn. Hahn was surprised that Nemecek had selected Bush, and he sent the selection memo to Caldwell. Caldwell then spoke with Nemecek about the decision. According to Caldwell, Nemecek explained that in selecting Bush for the position, he had no intention of circumventing the district; rather, he had completed the PD-011 form and authored the selection memo because he had been told to go through the motions, and Nemecek thought he had done what the process required. (Hahn ECF No. 145-18, PageID.1281). Nemecek further stated that he believed that his memo and the completed form did not matter in any event, since Caldwell had already decided not to approve the transfer. (*Id.*).

Believing that by being told to "go through the motions," Nemecek may have "pencil whipped," or inflated, Bush's scores, Caldwell asked Hahn to follow up with Nemecek and ask if

the scores on the PD-011 accurately reflected Bush's performance in the interview. If the scores were not accurate, Hahn was to instruct Nemecek to resubmit the PD-011 with accurate scores. (Hahn ECF No. 145-18, PageID.1281). Hahn did as he was told. Nemecek then discussed the matter with Connie Swander. Ms. Swander indicated she would not revisit the score. Nemecek then informed Hahn and Caldwell.

F. Caldwell Speaks to H.R. About the Bush Application

Caldwell and Horton subsequently had a conversation about the Bush application and Nemecek and Swander's PD-011 scores. During the conversation, Ms. Horton indicated that a lateral interview does not require the use of the PD-011 scoring grid or a full selection memo. (Hahn ECF No. 142-2, PageID.1014). In a follow up email, Horton confirmed that the PD-011 form was not required. (Hahn ECF No. 145-18, PageID.1278). Having received word that the PD-011 form was not required, there was no longer any need to revisit the scores on the PD-011. And on October 30, 2019, Nemecek completed a revised selection memo that requested the Assistant Post Commander position be opened to all applicants. (Hahn ECF No. 142-14, PageID.1051).

III. The Disciplinary Process

A. Internal Affairs Investigates Hahn and Caldwell

On November 1, 2019, the Michigan State Police's Professional Standards Committee received a complaint that alleged Hahn "used his position to manipulate a hiring process to exclude D/Lt. Mike Bush from a lateral transfer to the Gaylord Post." (Hahn ECF No. 142-2, PageID.1004). The complaint was investigated by F/Lt. Brody Boucher, the commander of the Professional Standards section.

Over the course of several weeks, the investigation grew to include Caldwell. Boucher received permission to monitor Caldwell and Hahn's emails, reviewed other documents, and interviewed Hahn, Caldwell, Nemecek, Belcher, Swander, Horton, Arnold, and Bush. In his report summarizing his interviews, Boucher described how Nemecek and Swander felt uncomfortable with how Hahn and Caldwell had interacted with them during the application process. Nemecek described how Hahn and raised his voice and badgered him. Nemecek felt "sick to his stomach" about how things had taken place. (Hahn ECF No. 142-2, PageID.1006).

B. Charges are Filed Against Hahn and Caldwell

Boucher's internal affairs investigation resulted in a final report that was sent to Director Gasper on March 5, 2020. (Hahn ECF No. 154-4, PageID.1402).[5] Four days later, a statement of charges and proposed discipline against Hahn and Caldwell was released. The statement of charges as to Plaintiff Hahn recommended termination. The charges described the basis for the recommendation:

> An internal affairs investigation . . . established that in October 2019, you violated department policy when you used your position to bully and intimidate members under your command participating in a selection process. You demonstrated a lack of competence when you failed to verify the necessary requirements of a selection process and provided inaccurate and unethical direction to a subordinate employee. You violated Civil Service Rules when you directed a subordinate to manipulate a selection process to ensure a qualified candidate was not selected. You were insubordinate when you stated you understood a directive not to discuss the internal affairs investigation and subsequently sent emails to another principal member prior to their investigatory interview. After being given a

[5] This exhibit was included in a Motion to Supplement that was filed in both cases. (Hahn ECF No. 154; Caldwell ECF No. 158). In addition to the motion to supplement, counsel for Plaintiffs referenced additional authority as part of his oral argument. The defense opposes the motion to supplement. The gist of the opposition is that the exhibits amount to an improper sur-reply. The Court has reviewed the motion, and the defense opposition. None of the additional exhibits chage the analysis or the conclusions the Court reaches below. The Court grants the motion to supplement, however, to the extent it assists in demonstrating a more complete factual record.

> direct order to fully and truthfully answer questions, you were less than truthful during your investigatory interview.

(Hahn ECF No. 142-15, PageID.1053).

Plaintiff Caldwell's charges recommended demotion:

> An Internal Affairs investigation . . . established that in October 2019, you violated Civil Service Rules when you directed the review of independently assessed interview scores, not on a basis of known merit, efficiency, or fitness; rather to align with your predetermined outcome. Your actions show a clear and distinct intent to undermine the selection process. You demonstrated a lack of competence when you provided inaccurate and contradictory information regarding the relevant facts and details related to your role in the selection process, including a notarized affidavit. You failed to uphold high ethical standards and ensure the integrity of state government.

(Caldwell ECF No. 137-15, PageID.1017).

C. Hahn's Email to Caldwell

Plaintiffs contend these charges were hastily prepared after Hahn emailed Caldwell a day earlier about the results of the Michigan State Police's investigation into his complaints about Sergeant Gill. That investigation resulted in a recommendation that Gill receive a two-day suspension, though that discipline was later waived by Lt. Colonel Arnold.

After hearing about the results of the Gill investigation, apparently from Caldwell, Hahn sent an email to Caldwell expressing his displeasure that Gill had received such a light sanction. Hahn remarked that he believed his complaints about the Michigan State Police's double-standards were being ignored. Hahn sensed that he was being viewed as a dissenter by his peers and by the leadership team. He believed he was being punished for his comments. (Hahn ECF No. 145-15, PageID.1271). Asserting that their email was being monitored at this time, Plaintiffs allege the charges were written up when it was clear that Hahn was not going to let the Gill matter go.

D. The Disciplinary Conferences Result in Hahn's Termination and Caldwell's Demotion.

Hahn and Caldwell's disciplinary conference took place on March 13, 2020, before Lt./Col. Chris Kelenske and Inspector Lisa Gee-Cram. At the hearing, Hahn alleged that he was targeted for opposing the racial and gender minority preferences of the state police and his complaints about Sergeant Gill. (Kelenske Dep. 14-15, Hahn ECF No. 142-18, PageID.1082). At the conclusion of the hearing, the recommended discipline was upheld. Caldwell was ultimately replaced by another white male within the MSP. Hahn's position had not been filled at the time briefing had concluded, however at the hearing on this matter, counsel for the defense stated that Hahn's position had also been filled by a white male.

PROCEDURAL HISTORY

Hahn and Caldwell filed their respective lawsuits raising state and federal claims on May 11, 2020. Following the Rule 16 scheduling conference, Second Amended Complaints were filed both raising identical federal claims.[6] Count I asserts a claim against Defendant Gasper under 42 U.S.C. § 1983 for Fourteenth Amendment reverse race and gender Discrimination. Count II presents a claim against Defendant Gasper under Section 1981 for unlawful retaliation. Count III raises a claim against the Michigan State Police for reverse discrimination under Title VII. Finally Count IV brings a claim of Title VII retaliation against the Michigan State Police.

Following discovery, the defense filed a motion for summary judgment in both cases. (Hahn ECF No. 141; Caldwell ECF No. 136). Plaintiffs responded in both cases by waiving their claims in Count I. Plaintiffs oppose the motions in all other respects. At the October 26, 2021, hearing the Court confirmed with the parties that Plaintiffs were waiving their Section 1983 claim

[6] The Court declined to exercise supplemental jurisdiction over the state law claims at the Rule 16 conference.

against Defendant Gasper, and then heard argument on the remaining three counts. Thereafter the Court took the matter under advisement. The matter is ready for decision.

LEGAL STANDARDS

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). Material facts are facts which are defined by substantive law and are necessary to apply the law. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id*. at 252. In deciding a motion for summary judgment, the court must draw all inferences in a light most favorable to the non-moving party, but may grant summary judgment when "'the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.'" *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986)). In *Scott v. Harris*, 550 U.S. 372 (2007), the Court ruled that in considering a motion for summary judgment in the context of an excessive force claim, a court should "view[]the facts in the light depicted by the videotape." *Harris*, 550 U.S. at 380-81. The Court emphasized that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment. *Id.* at 380.

DISCUSSION

I. Title VII Reverse Discrimination

The Court begins with Count III of Plaintiffs' Second Amended Complaints, which raise a Title VII claim against the Michigan State Police for reverse race and gender discrimination.

Plaintiffs do not contend they have direct evidence of discrimination in support of this claim. Instead, both sides analyze the discrimination claim under the burden shifting approach set out in *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973), as modified in cases of reverse discrimination. Applying that framework, the Court concludes the defense is entitled to summary judgment in its favor,

A. Burden Shifting in a Reverse Discrimination Case

Typically, under *McDonnell Douglas*, a plaintiff must first establish a prima facie case of discrimination by showing that "(1) he is a member of a protected class; (2) he was qualified for his job; (3) he suffered an adverse employment decision; and (4) he was replaced by a person outside the protected class or treated differently than similarly situated non-protected employees." *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 391 (6th Cir. 2008). "The Sixth Circuit has adapted this four-prong test to cases of reverse discrimination, where a member of the majority is claiming discrimination." *Leadbetter v. Gilley*, 385 F.3d 683, 690 (6th Cir. 2004). "In such cases, a plaintiff satisfies the first prong of the prima facie case by demonstrating background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Id.* (internal citations and quotation marks omitted); *see also Romans v. Mich. Dep't of Human Servs.*, 668 F.3d 826, 837 (6th Cir. 2012) (in case involving majority plaintiff, the plaintiff "must establish the first prong of a prima facie case by showing background circumstances to support the suspicion that the defendant is the unusual employer who discriminates against the majority"). "To satisfy the fourth prong in a reverse-discrimination case, the plaintiff must show that the defendant treated differently employees who were similarly situated but were not members of the protected class." *Leadbetter*, 385 F.3d at 690 (internal citations and quotation marks omitted). The first and fourth prongs should be viewed separately.

"Showing that similarly situated employees of other races were treated differently than the plaintiff is an independent evidentiary requirement . . . holding that such evidence also satisfies the background circumstances requirement would collapse a four-legged test into a three-legged one." *Treadwell v. Am. Airlines, Inc.*, 447 F. App'x 676, 679 (6th Cir. 2011).

If a plaintiff makes out a prima facie reverse discrimination case, the "the burden shifts to the defendant to offer evidence of a legitimate, non-discriminatory reason for the adverse employment action." *White*, 533 F.3d at 391; *Romans*, 668 F.3d at 838-839 (applying *McDonnell-Douglas* approach in reverse-discrimination case). "Finally, if the defendant succeeds in this task, the burden shifts back to the plaintiff to show that the defendant's proffered reason was not its true reason, but merely a pretext for discrimination." *White*, 533 F.3d at 391-92.

B. Prima Facie Case

The defense does not dispute that Plaintiffs were qualified for their positions and that they suffered an adverse employment action. The defense argues, however, that Plaintiffs are unable to demonstrate the background circumstances that are required to satisfy the first element. The defense further contends Plaintiffs are unable to show they were treated differently than non-white, non-male employees. While Plaintiffs likely have done enough to show background circumstances, the Court determines that Plaintiffs fail to meet the fourth element of a prima facie case.

i. Background Circumstances

The background circumstances requirement stems from a 1981 case from the D.C. Circuit, *Parker v. Baltimore & Ohio Railroad*, 652 F.2d 1012 (D.C. Cir. 1981); *see* II BARBARA T. LINDERMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, Ch. 37.II.B, pp. 2488 (4th ed. 2007). Under this approach, a plaintiff must establish that "background circumstances support

the suspicion that the defendant is that unusual employer who discriminates against the majority." *Parker*, 652 F.2d at 1017-18. "The types of background circumstances that might support this type of inference are: (1) evidence indicating that the employer has some reason or inclination to discriminate invidiously against the majority group, or (2) evidence from which an inference of discrimination can otherwise be drawn." LINDERMANN & GROSSMAN, *supra* at pp. 2489. The Sixth Circuit has further stated that to show background circumstances, the plaintiff may present evidence of the defendant's unlawful consideration of race in employment decisions in the past. *Sutherland v. Mich. Dept. of Treasury*, 344 F.3d 603, 615 (6th Cir. 2003). This showing "is not onerous, and can be met through a variety of means, such as statistical evidence; employment policies demonstrating a history of unlawful racial considerations; evidence that the person responsible for the employment decision was a minority; or general evidence of ongoing racial tension in the workplace." *Johnson v. Metro. Gov't of Nashville & Davidson Cty.*, 502 F. App'x 523, 536 (6th Cir. 2012).

The defense argues, in the main, that Plaintiffs cannot demonstrate background circumstances because all the actors involved in this case are white males. (Hahn ECF No. 142, PageDI.983-984). Michael Bush is a white male. Hahn and Caldwell are also both white males, and so are Gasper, Boucher, Arnold, and Kelenske. This distinguishes those cases, the defense points out, where minority supervisors discriminated against white male employees. (*Id.*). Moreover, the defense identifies a litany of cases where the Michigan State Police have been sued for discriminating against racial or gender minorities. On this basis it insists it cannot be the unusual employer who discriminates against white males. It is true that courts often find background circumstances where a member of a racial or gender minority is responsible for taking the adverse employment action. *See, e.g.*, *Leavey v. City of Detroit*, 467 F. App'x 420, 425 (6th

Cir. 2012) ("The mere fact that a racial minority took an adverse action against Plaintiff is sufficient to satisfy the background circumstances requirement."). But that is not the only way to demonstrate background circumstances. And here Plaintiffs have pointed to enough to raise at least a material issue of fact that there was ongoing racial tension within the Michigan State Police and in particular that white males felt they were being treated differently than other, non-white and non-male employees. In *Johnson* for example, a panel of the Sixth Circuit found sufficient background circumstances where the plaintiffs "presented depositions by persons at all levels of [the defendant employer's] hierarchy who testified that the department was interested in promoting diversity and that it was acutely conscious of its long history of racial and gender imbalance." *Johnson v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, 502 F. App'x 523, 537 (6th Cir. 2012). Plaintiffs point to similar evidence here by way of their own depositions and declarations, as well as through other statements by white male officers. A jury may well believe that the Michigan State Police's efforts were legitimate efforts towards promoting diversity in its ranks rather than unlawful race and gender discrimination. Under the Rule 56 lens, however, the Court concludes Defendants have done enough to satisfy this element.

ii. Different Treatment

Plaintiffs fail, however, to meet their burden with respect to the fourth element of a prima facie case. Because they were both replaced by other white males, to meet this element Plaintiffs must show they were treated differently than similarly situated, non-white or non-male employees. *Romans*, 668 F.3d at 837. "In order to be considered 'similarly situated' for the purposes of comparison, the employment situation of the comparator must be similar to that of the plaintiff in all relevant aspects." *Id.* at 837-838 (quoting *Highfill v. City of Memphis*, 425 F. App'x 470, 474 (6th Cir. 2011)). In evaluating whether an individual is sufficiently similarly situated, courts

consider "whether the employees: (1) engaged in the same conduct, (2) dealt with the same supervisor, and (3) were subject to the same standards." *Johnson v. Ohio Department of Public Safety*, 942 F.3d 329, 331 (6th Cir. 2019). At bottom, "Plaintiff must show that a minority [employee] engaged in similarly-sanctionable conduct, but received a less severe sanction." *Arendale v. City of Memphis*, 519 F.3d 587, 604 (6th Cir. 2008).

Plaintiffs each identify the same four individuals as "egregious examples of disparate discipline:" (1) Sergeant Dwayne Gill; (2) Keyonn Whitfield; (3) Monica Yesh; and (4) Captain James Grady. (Hahn ECF No. 145, PageID.1148-1149; Caldwell ECF No. 142, PageID.1116-1117).[7] Applying the above standards, none of these individuals are sufficiently comparable. Gill, Whitfield, and Grady are all males, for one thing, and so cannot assist Plaintiffs on a reverse gender discrimination claim. Plaintiffs also do not compare themselves to Sergeant Gill. Rather they assert that Gill was treated better than another white male colleague who allegedly made sexist remarks. But this does not demonstrate that they were treated differently than members outside a protected class, and so Sergeant Gill does not assist Plaintiffs in meeting their burden. Even if Plaintiffs could step in the shoes of F/Lt. Rod (the white male they compare to Sgt. Gill), they do

[7] The factual discussion of Plaintiffs' briefs identify a Captain Greg Michaud as a "telling comparator." (Hahn ECF No. 145, PageID.1142; Caldwell ECF No. 142, PageID.1110). Plaintiffs allege that Captain Michaud improperly used the state police's LIEN network for personal purposes and lied about his actions. (ECF No. 145, PageID.1142). Plaintiffs do not reference Captain Michaud in their argument section, but to the extent Plaintiffs contend Michaud assists them in satisfying this element of a prima facie case as a comparator, the Court disagrees. As a male, Michaud does not assist them in a disparate treatment claim on account of gender. Plaintiffs also do not provide Michaud's race. Assuming Captain Michaud is a racial minority, it is not clear how Captain Michaud was treated better than Plaintiffs. It appears Captain Michaud and Plaintiff Caldwell held the same rank. Like Plaintiff Caldwell, the recommended discipline was demotion. Indeed, Michaud's recommended discipline was even worse—it included a 30-day suspension. (ECF No. 145, PageID.1142). Michaud chose to retire, while Plaintiff Caldwell did not. But that does not demonstrate Michaud was treated differently. Plaintiffs themselves state they were given the option of retiring and refused. (ECF No. 145, PageID.1141).

not satisfy their burden of demonstrating Rod is sufficiently comparable to Gill. Gill and Rod held different ranks. And Plaintiffs do not state when Rod made the remarks, or who his superiors were. Thus Gill is not a sufficient comparator.

Hahn next asserts Whitfield was treated differently than he was, but Whitfield is not sufficiently comparable to him.[8] According to an internal affairs report referenced by Hahn, Whitfield is an African American male who is a First Lieutenant in the Second District. Apparently in response to the same fall forum that Plaintiffs identify, Whitfield held a staff meeting on November 20, 2019. At the meeting, Whitfield spoke about a specific panel at the forum he had attended and referred to one panelist as "he gay." Several staff members felt offended or embarrassed by Whitfield's comments. Whitfield admitted he discussed the forum but denied making the specific comments. The internal report determined that Whitfield had created a hostile work environment in describing a male employee and that he had engaged in conduct contrary to that expected by a command officer by referring to an employee in a manner that caused angst, anger, and embarrassment amongst his subordinates. (ECF No. 145-33, PageID.1317-18). Hahn attempts to shoehorn his alleged conduct aside that of Whitfield. He says that Whitfield lied and intimidated his subordinates. Hahn contends this is the same conduct that was asserted against him, but Whitfield was not terminated. (ECF No. 145, PageID.1149). The Court disagrees. There is no indication in the internal affairs report that Whitfield had lied. And rather than intimidate subordinates as part of an internal hiring process, Whitfield was alleged with creating a hostile work environment that was offensive. It was not alleged to be intimidating. Whitfield also held a

[8] Caldwell does not allege that Whitfield was treated differently than he was. (Caldwell ECF No. 142, PageID.1117).

different rank and served in a different district than Hahn. Thus, Whitfield is not an appropriate comparator to Plaintiff Hahn.

Next, both Plaintiffs state that Monica Yesh, a white female, is a comparator because she engaged in misconduct but did not receive a sanction. They contend that Ms. Yesh awarded towing and automotive service contracts in exchange for sports tickets and work on her personal vehicle. An investigation confirmed improprieties, but Ms. Yesh was permitted to transfer to a different position and the investigation was not completed. (Hahn ECF No. 145, PageID.1149; Caldwell ECF No. 142, PageID.1117). Monica Yesh is not sufficiently comparable because the misconduct alleged happened in 2015, four years earlier than events of this case. (McCormick Dep. 239, ECF No. 145-9, PageID.1237). As the defense points out, at that point Governor Whitmer had not yet been elected and Defendant Gasper was not yet in office. Another individual was in charge of conducting internal affairs. The differences in timing, investigators, and the supervisors involved means Ms. Yesh is not a sufficient comparator.

Plaintiffs' reference to *McMillan v. Castro*, 405 F.3d 405 (6th Cir. 2005), does not change matters. In *McMillan*, a panel of the Sixth Circuit reviewed a trial court's jury instructions that to be similarly situated "the individual with whom Plaintiff seeks to compare her treatment must have dealt with the same supervisor." *Id.* at 413. The court observed that the same supervisor language in its earlier cases "has never been read as an inflexible requirement." *Id.* at 414 (quoting *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 479-80 (6th Cir. 2003)). What matters is that the plaintiff and comparator be similar in "all of the *relevant* aspects." Thus whether the same supervisor "criterion is relevant depends upon the facts and circumstances of each individual case." *Id.* Along these lines the Sixth Circuit in *Seay* found an employee sufficiently comparable to the plaintiff even though they had different immediate supervisors because "all of the people involved in the

decision-making process, including Plaintiff's immediate supervisor and the department manager, were well-aware of the discipline meted out to past violators, including [the non-protected employee], who had violated the policy on at least two occasions." *Seay*, 339 F.3d. at 480.

Like *Seay*, Plaintiffs say, everyone knew about Ms. Yesh and her misconduct. (Caldwell Dep. 180-181, Hahn ECF No. 145-2, PageID.1175). Given the turnover of the directors within the Michigan State Police after a change in administration, Plaintiffs argue, this is one of those instances where the same supervisor criterion is not relevant. But this is not simply a case where Ms. Yesh and Plaintiffs had different supervisors. And the involvement of the director in these situations, if any, appears to be minimal. The conduct that Ms. Yesh allegedly committed is much different than that alleged against Plaintiffs. The timing, difference in districts, difference in investigators, and difference in the alleged misconduct all weigh against finding sufficient similarity.

Finally, both Plaintiffs argue that Captain James Grady, a black male, is a comparator. According to Plaintiffs, Grady was faced with the same situation they were in. Serving in the same position as Caldwell in another district, Caldwell had an opening for a lateral transfer with a single applicant (who happened to be Caldwell's brother). Grady denied the lateral transfer request and he was not punished. (Caldwell Dep. 252-254, ECF No. 145-2, PageID.1184). Grady is not sufficiently comparable because Plaintiffs were not sanctioned for denying a lateral transfer. Rather, it was their alleged interference and misconduct in the process that led the investigation and subsequent discipline. They do not allege that Grady engaged in any conduct similar to that which led to their charges. To the extent Plaintiffs allege Grady was treated better because Arnold did not interfere in the process under Grady, the Court is not persuaded. Plaintiffs state that Grady

"went through the motions" with his applicant, which is all that Plaintiffs allege their superiors required with Bush.

For all the above reasons, then, Plaintiffs fail to meet the fourth element and have not satisfied their burden of establishing a prima facie case of race and gender discrimination.

C. Non-Discriminatory Reasons and Pretext

Even if Plaintiffs were able to satisfy their burden of demonstrating a prima facie case of reverse race and gender discrimination, they have not demonstrated that the reasons justifying their demotion and termination were pretext for unlawful discrimination.

At the second step of the *McDonnell Douglas* analysis, the defendant needs to advance a legitimate, non-discriminatory reason for its employment decision. Defendants say they have done so. Following the investigation, it was determined that Hahn and Caldwell, believing a PD-011 form was necessary, instructed Nemecek to change the score, and obstructed Bush's lateral transfer. Then during the investigation, Hahn was less than truthful about what he had done. Plaintiffs say the description in the defense brief does not entirely align with the statement of charges, but they do not expressly contend that Defendants have failed to satisfy their burden at the second step. (*see, e.g.*, Caldwell ECF No. 142, PageID.1118).

Thus, the matter proceeds to the third step of the *McDonnell Douglas* approach and the burden shifts back to Plaintiffs. At this stage, the plaintiff prevails only if he proves "either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate [the plaintiff's] discharge, or (3) that they were *insufficient* to motivate discharge." *Russell v. Univ. of Toledo*, 537 F.3d 596, 604 (6th Cir. 2008) (quotation omitted). No matter the path chosen, the plaintiff retains the ultimate burden of producing "sufficient evidence from which

the jury could reasonably reject [the employer's] explanation and infer" intentional discrimination. *Braithwaite v. Timken Co.*, 258 F.3d 488, 493 (6th Cir. 2001) (internal quotation omitted).

Furthermore, if an employer "honestly believes" its proffered nondiscriminatory reason, courts do not infer pretext just because the reason proves "mistaken, foolish, trivial, or baseless." *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998). "In other words, arguing about the accuracy of the employer's assessment is a distraction because the question is not whether the employer's reasons for a decision are *right* but whether the employer's description of its reasons is *honest*." *Id.* (internal quotations omitted). A belief is honestly held so long as the employer can "establish its reasonable reliance on the particularized facts that were before it at the time the decision was made." *Id.* at 807. The employee must then produce "proof to the contrary" that challenges the foundation of the employer's belief or lose on summary judgment. *Id.*; *see also Braithwaite*, 258 F.3d at 494.

Plaintiffs claim Defendants' proffered justifications are pretextual for six reasons. (Hahn ECF No. 145, PageID.1150-1151; Caldwell ECF No. 142, PageID.1118-1119). All the arguments come down to the assertion that Hahn and Caldwell did not manipulate the hiring process and that they did not intimidate Nemecek into altering a PD-011 form that Hahn and Caldwell both believed was necessary for lateral transfers. Plaintiffs fail to demonstrate pretext, however, because even accepting this assertion, there is plenty to demonstrate that Defendants honestly believed Plaintiffs interfered and intimated Nemecek during the process and Plaintiffs fail to produce proof to the contrary.

The investigation into Hahn and Caldwell was lengthy and thorough. It included document reviews, including an affidavit authored by Caldwell, and interviews of the main players, including Nemecek, Arnold, Horton, Hahn, and Caldwell. Boucher testified that it was Plaintiffs own

statements that led him to conclude Hahn and Caldwell believed a PD-011 form was necessary as part of the interview process. (Boucher Dep. 32-33, Caldwell ECF No. 137-16, PageID.1025). During his investigation, Nemecek told Boucher that Hahn had yelled at him, and that he felt sick to his stomach about the process. (Caldwell ECF No. 137-2, PageID.967). All told, there is ample evidence demonstrating Defendants' honest belief in the nondiscriminatory reason for Plaintiffs' discipline.

Plaintiffs offer nothing that would challenge the foundation of the Michigan State Police's nondiscriminatory belief. The six bullet points they list all fail to create a triable issue of pretext. In their first and sixth arguments, Plaintiffs attempt to demonstrate pretext by showing there was no basis in fact for Defendants' assertion that Plaintiffs incorrectly believed a PD-011 form was necessary. This is so, they say, because Nemecek testified he did not recall whether Hahn instructed him to complete a PD-011 form when he interviewed Bush. (Nemecek Dep. 21, Hahn ECF No. 145-19, PageID.1283). But to overcome Defendants' honest belief, Plaintiffs "must allege more than a dispute over the facts upon which [the discipline] was based." *Braithwaite v. Timken Co.*, 258 F.3d 488, 494 (6th Cir. 2001). This is all they have done here. Moreover, the conduct that led to Plaintiff's discipline was what took place afterwards when, having received Nemecek and Swander's completed PD-011, Caldwell and Hahn pressured Nemecek into reviewing the PD-011. This conduct, Boucher testified, was inconsistent with individuals who believed PD-011s were not necessary, as Hahn had told Boucher. Indeed, Plaintiff's own brief makes clear Plaintiffs did, for a time, believe PD-011 forms were necessary when they admit they asked Nemecek to review his scores for accuracy.

As further evidence of pretext, Plaintiffs contend the reasons offered by the Defendants were not the actual reason for their discipline because the justifications between the statement of

charges, the defense brief, and the hearing officer do not perfectly align. But Defendants see daylight when there is none. The statement of charges, hearing officer's testimony, and defense brief all reflect that Plaintiffs faced discipline for interfering in Bush's selection process and acted in a manner that reflected they believed a PD-011 form was necessary.

Next, Plaintiffs assert that the defendants selectively enforced its transfer policy. "[S]elective enforcement or investigation of a disciplinary policy can also show pretext." *Baker v. Macon Resources, Inc.*, 750 F.3d 674, 677 (7th Cir. 2014). Plaintiffs allege Defendants selectively enforced the applicant policy against them but did not enforce it against Captain Grady. (Hahn ECF No. 145, PageID.1150). The Court sees no selective enforcement because Plaintiffs assert that like them, Grady had to "go through the motions" on the lateral transfer policy. (*Id.* at PageId.1149). Thus, the policy applied equally to Grady and Plaintiffs.

Finally, Plaintiffs contend that Defendants' pattern and practice of discriminating against white males, along with their concealment of Gasper as the ultimate decisionmaker, amounts to pretext. The Court disagrees. As set out more fully below, the evidence of Defendant Gasper's active involvement, if any, in Hahn and Caldwell's disciplinary process is extremely thin. And Plaintiffs offer nothing to demonstrate that other employees acted to conceal Gasper's involvement.

Based on all the above, the Court concludes that Defendants are entitled to summary judgments in their favor on Count III of Plaintiffs' Second Amended Complaints. Plaintiffs fail to establish a prima facie case of reverse race and gender discrimination. Even if they had, Plaintiffs fail to demonstrate that the justifications for Hahn's termination and Caldwell's demotion were pretext for unlawful employment discrimination.

II. Retaliation

Plaintiffs' remaining two counts both assert that their discipline was retaliation for the protected comments they made regarding the racial and gender preferences within the Michigan State Police. Count II alleges retaliation in violation of 42 U.S.C. § 1981 against Defendant Gasper and Count IV alleges retaliation in violation of Title VII against the Michigan State Police.[9] "The elements of a retaliation claim under § 1981 are the same as those under Title VII." *Boxill v. O'Grady*, 935 F.3d 510, 520 (6th Cir. 2019) (citing *Noble v. Brinker Int'l, Inc.*, 391 F.3d 715, 720 (6th Cir. 2004); *see also Wade v. Knoxville Utilities Bd.*, 259 F.3d 452, 464 (6th Cir. 2001) (race retaliation claim brought under Section 1981 "governed by the same burden-shifting standards as the claims under Title VII.").

McDonnell Douglas burden shifting applies to Title VII retaliation claims premised on indirect evidence. *Laster v. City of Kalamazoo*, 746 F.3d 714, 730 (6th Cir. 2014). To establish a prima facie case of retaliation under Title VII, a plaintiff must show that (1) he engaged in protected activity; (2) the defendant knew of plaintiff's engagement in protected activity; (3) the defendant took an action materially adverse to the plaintiff; and (4) there exists a causal connection between the protected activity and the materially adverse action. *Id.* "Title VII retaliation claims 'must be proved according to traditional principles of but-for causation," which "requires proof

[9] In general, Section 1981 does not provide a cause of action against state actors, like Defendant Gasper, sued in their individual capacity. *See McCormick v. Miami Univ.*, 693 F.3d 654, 661 (6th Cir. 2012); *Garceau v. City of Flint*, No. 12-cv-15513, 2013 WL 5954493 (E.D. Mich. Nov. 7, 2013) (dismissing Section 1981 race retaliation claim against state actor in official and individual capacities). The defense did not seek dismissal of Count II for this reason, however, and the Court notes that plaintiffs may bring claims under Section 1983 that are premised on violations of Section 1981. *See Boxill v. O'Grady*, 935 F.3d 510, 519 (6th Cir. 2019). Count II of Plaintiffs' Second Amended Complaint incorporates the previous paragraphs, including those referencing Section 1983. Accordingly, for purposes of this motion, the Court construes Count II of Hahn and Caldwell's complaints as asserting Section 1983 claims against Defendant Gasper premised on violations of Section 1981.

that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.'" *Id.* (quoting *Univ. of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 362 (2013)).

If a plaintiff establishes a prima facie case, the burden shifts to the defendant to show a legitimate, non-retaliatory reason for the materially adverse action. If the defendant satisfies this requirement, the burden shifts back to the plaintiff to establish that the reason given is a pretext. *Montell v. Diversified Clinical Services, Inc.*, 757 F.3d 497, 508 (6th Cir. 2014). A plaintiff can demonstrate pretext by showing "(1) that the proffered reasons had no basis *in fact*; (2) that the proffered reasons did not *actually* motivate [her discharge], or (3) that they were *insufficient* to motivate discharge." *Blizzard v. Marion Technical College*, 698 F.3d 275, 285 (6th Cir. 2012) (quotation marks omitted) (emphasis in original). Pretext "is a commonsense inquiry: did the employer fire the employee for the stated reason or not." *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 n. 4 (6th Cir. 2009). "At the summary judgment stage, the issue is whether the plaintiff has produced evidence from which a jury could reasonably doubt the employer's explanation. If so, [his] prima facie case is sufficient to support an inference of discrimination at trial." *Id.*

A. Prima Facie Case

i. Protected Conduct

Plaintiffs' claims arise from Title VII's so-called "opposition clause," which prohibits employers from discriminating against an employee "because he has opposed any practice made an unlawful employment practice. 42 U.S.C. § 2000e-3(a); *see Crawford v. Metro Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 274 (2009). A plaintiff's Title VII retaliation claim based on the opposition clause must put "h[is] employer on notice that h[is] complaint concerns statutory rights." *Brown v. VHS of Michigan, Inc.*, 545 F. App'x 368, 373 (6th Cir. 2013). "An

employee has engaged in opposing activity when [he] complains about unlawful practices to a manager, the union, or other employees." *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 516 (6th Cir. 2009). "A plaintiff's objection to an employment practice is protected activity if [his] supervisors 'should have reasonably understood that [he] was making a complaint of sex discrimination.'" *Mumm v. Charter Twp. of Superior*, 727 F. App'x 110, 112 (6th Cir. 2018) (quoting *Braun v. Ultimate Jetcharters, LLC*, 828 F.3d 501, 512 (6th Cir. 2016)). "Title VII does not restrict the manner or means by which an employee may oppose an unlawful employment practice." *Yazdian v. ConMed Endoscopic Technologies, Inc.*, 793 F.3d 634, 645 (6th Cir. 2015). A plaintiff's complaint does not have to be "lodged with absolute clarity, or precision." *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989). However, "Title VII does not protect an employee . . . if his opposition is merely a 'vague charge of discrimination.'" *Yazdian*, 793 F.3d at 645 (quoting *Booker*, 879 F.2d at 1313). A complaint "must allege unlawful discrimination rather than general unfairness." *Mumm*, 727 F. App'x at 113. Applying these standards, Plaintiffs fail to demonstrate a triable issue of protected activity.

Plaintiffs point to three complaints that they allege amount to protected activity: (1) Hahn's September 2019 complaint to Lisa Rish about Dwayne Gill's retirement party comedy routine and Caldwell's January 2020 comments to Arnold supporting Hahn's complaint; (2) Hahn and Caldwell's October 9, 2019, comments at the bureau meeting; and (3) Hahn's email to Caldwell on March 8, 2020. Even when viewed under the Rule 56 lens, the actions Plaintiffs identify demonstrate at most, a complaint of general unfairness, rather than unlawful discrimination. For example, Plaintiff Hahn's comments reflect he was upset that the Michigan State Police failed to apply its own professional standards and code of conduct to Sergeant Gill's comments. He complained about Gill's comments not because he felt Defendants were discriminating against

whites, but because he felt compelled by his oath of office to point out a violation of Michigan State Police's code of conduct. There is nothing in this statement, or Caldwell's statement of support, that would lead an employer to reasonably understand that Hahn and Caldwell were complaining about unlawful discrimination, rather than their perception of a general unfairness in the way the Michigan State Police ran their operations and conducted their internal disciplinary process. In this, Hahn's complaint, and Caldwell's statement of support are similar to the complaints of "ethnocism" the Sixth Circuit Court of Appeals found did not amount to protected activity in *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1313 (6th Cir. 1989).

Indeed, the entire thrust of the complaints Plaintiffs depend upon is that their chief concern was their belief that the diversity initiative was unfair to white police officers, not that it unlawfully discriminated against white males. There is nothing wrong with a commitment to diversity, and the comments Plaintiffs point to, both on October 9, 2019, and March 8, 2020, merely demonstrate that they believed that the initiative would have a negative impact on the morale of white male officers, not that the initiative ever crossed the line into unlawful discrimination. The Court concludes that Plaintiffs have not made a prima facie case because they have not demonstrated they engaged in protected activity.

ii. Knowledge

Even if any of the complaints Plaintiffs identify could amount to protected activity, Plaintiffs have failed to present evidence that the decisionmaker was aware of their protected activity. Here Plaintiffs are emphatic that the one who decided to terminate Hahn's employment and demote Caldwell was Director Gasper. Assuming for purposes of argument this is true, Plaintiffs fail to demonstrate Gasper had any knowledge they complained about Gill or about the Michigan State Police's diversity initiatives.

In most Title VII retaliation cases, "the plaintiff will be able to produce direct evidence that the decision making officials knew of the plaintiff's protected activity." *Mulhall v. Ashcroft*, 287 F.3d 543, 552 (6th Cir. 2020). This is true even for those cases relying on circumstantial evidence under the *McDonnell-Douglas* framework. *See id.* at 552 & 552 n.5 (citing *Peterson v. Dialysis Clinic, Inc.*, No. 96–6093, 1997 WL 580771, at *4 (6th Cir. Sept. 18, 1997)). "In many such cases, for example, the adverse action will be taken by the same supervisor to whom the plaintiff has made complaints in the past." *Id.* at 552. Here, however, Plaintiffs do not have direct evidence that Gasper knew of the alleged protected activity. Gasper testified he did not know, until just before his deposition, that Hahn had complained about Sergeant Gill. Rather, when the complaint arose, Gasper gave instructions to Stephanie Horton that he did not want to know who the complainant was. (Gasper Dep. 28-29, Hahn ECF No. 142-20, PageID.1093-1094). He did not recall hearing from Lt. Colonel Arnold that Hahn and Caldwell had made comments about the diversity initiative during the October 9, 2019, meeting. (Gasper Dep. 34, Caldwell ECF No. 142-6, PageID.1176; Gasper Dep. 38, Hahn ECF No. 142-20, PageID.1097). Gasper was not in attendance during that meeting. (*Id.* at 38). Plaintiffs state that Gasper did not deny that Arnold inform him of Plaintiff's protected activity (Caldwell ECF No. 142, PageID.1112) but crucially they do not provide any testimony that Arnold or Rish or Zarotney or anyone else ever relayed their comments to Gasper.

It is true that direct evidence of knowledge or awareness is not a requirement, and that a plaintiff may survive summary judgment by pointing to circumstantial evidence of the decisionmaker's knowledge. *Mulhall*, 287 F.3d at 552. Here Plaintiffs contend that "it strains credulity" to suggest that Arnold, or others, did not inform Gasper of Plaintiffs' protected activity.

But rather than point to circumstantial evidence, Plaintiffs merely speculate that Gasper must have known of their protected activity. This is not enough.

For example, Plaintiffs seem argue that Gasper must have known that Plaintiffs were opposed to his diversity policy since others who directly reported to Gasper knew about their complaints. They specifically note they had opposed the initiative to Lt. Arnold, who reported directly to Gasper, and Gasper testified that "it would be helpful to know" if there was dissension in the ranks. (Gasper Dep. 33-34, Hahn ECF No. 145-6, PageID.1208). Again, Plaintiffs state that Defendant Gasper did not deny that Lt. Colonel Arnold informed him of Plaintiffs' protected activity, as if it is somehow positive evidence that Arnold did tell Gasper about it. But Gasper testified he didn't remember Arnold telling him about Caldwell and Hahn's comments. (Gasper Dep. 34, ECF No. 145-6, PageID.1208). More importantly, Plaintiffs do not point to any testimony from Arnold to demonstrate that he did speak to Gasper about the matter. Without this, Plaintiffs' assertion that others in the ranks knew of their comments fails to satisfy their burden of showing Gasper knew about their comments. *See Evans v. Pro. Transp., Inc.*, 614 F. App'x 297, 301 (6th Cir. 2015) (noting that general corporate knowledge of protected activity is not enough and concluding the plaintiff's claim failed because there was no evidence that the decisionmaker had knowledge of plaintiff's protected activity). Even if internal affairs investigations were a standing agenda item at meetings where Gasper attended, Plaintiffs point to nothing by which a jury could conclude that Gasper knew the Complaint originated with Plaintiff Hahn. Plaintiffs point to the deposition testimony of Lt. Colonel Arnold and Deputy Director Shawn Sible in support of the assertion that the Gill investigation was discussed at these meetings where Gasper was in attendance. Sible testified that he had learned that Hahn had made a complaint, but he didn't learn about it until "after the fact." (Sible Dep. 30, Hahn ECF No. 145-20, PageID.1290). He further

testified that there was not a specific meeting about the Complaint, but he recalled a discussion about speech in private functions versus department sponsored functions, specifically concerning a retirement party." (*Id.*). Lt. Colonel Arnold did not recall seeing Hahn's September 13 email that was "forwarded up the chain." He remembers a general discussion about Sergeant Gill's comments in one of the leadership meetings." (Arnold Dep. 35-36, ECF No. 145-7, PageID.1219). At most, then, the cited record suggests that Sergeant Gill was discussed at a leadership meeting, it does not suggest that Gasper was aware that Hahn had made the complaint.

Plaintiffs' other arguments are not persuasive. Plaintiffs claim that Gasper must have known about their complaints because he gave them a cold shoulder at a meeting, and commented at a meeting that the Michigan State Police didn't need any more "White Male military types with crew cuts." Plaintiffs say this obviously referred to Caldwell and that it obviously means that Gasper knew about his protected activity. (Hahn ECF No. 145, PageID.1145). But without more, there is nothing to indicate that Gasper was referring to Caldwell specifically, rather than generic white males, much less that he was aware of their comments.

For all these reasons, the Court determines that Plaintiffs have failed to demonstrate a genuine issue of material fact that Gasper, the alleged decisionmaker, knew of their alleged protected comments. Based on the above, Plaintiffs have failed to make out a prima facie case of Title VII or Section 1981 race or gender retaliation.

B. Pretext

Even if Plaintiffs could satisfy their burden of showing a prima facie case of race or gender retaliation in violation of Title VII or Section 1981, the defense has offered a legitimate, nondiscriminatory reason for Plaintiffs' discipline, and Plaintiffs have failed to show a triable issue of pretext.

The analysis tracks the *McDonnell Douglas* framework used in Plaintiff's Title VII reverse race and gender discrimination claim. If a prima facie case is shown, the burden shifts to the employer to articular some legitimate nondiscriminatory reason for its actions. *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792-93 (6th Cir. 2000). The Plaintiff must then demonstrate "that the proffered reason was not the true reason for the employment decision." *Id.*

Here, both sides' references incorporate their arguments from Plaintiffs' Title VII reverse race and gender discrimination claims. For the reasons set out above, the Court concludes that the defense has provided a legitimate, nondiscriminatory reason for Plaintiffs' disciplines, and Plaintiffs have not shown those reasons were pretext for unlawful retaliation. Accordingly, Defendants are entitled to summary judgment on Plaintiffs' retaliation claims.

CONCLUSION

ACCORDINGLY, IT IS ORDERED:

1. Plaintiffs' Motions to Supplement (Hahn ECF No. 154; Caldwell ECF No. 158) are **GRANTED.**
2. Defendants' Motions for Summary Judgment (Hahn ECF No. 141; Caldwell ECF No. 136) are **GRANTED.**
3. These cases are **DISMISSED.** A separate Judgment shall issue.

Dated: December 27, 2021

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE