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

MICHAEL J. MCCORMICK,

Plaintiff,

v.

JOSEPH M. GASPER, et al.,

Defendants.

_____/

CASE No. 1:20-CV-779

HON. ROBERT J. JONKER

OPINION AND ORDER

INTRODUCTION

This is one of three civil lawsuits brought by white male police officers against their employer, the Michigan State Police, and the Director of the State Police, Joseph Gasper.[1] The officers claim they have been discriminated against because of their race and gender and further claim they have been retaliated against for opposing the race and gender minority preferences instituted by the Michigan State Police. In this case, Plaintiff Michael McCormick alleges he was passed over for the position of Post Commander in May 2019 in favor of a racial minority because of discriminatory and retaliatory animus due to his race, gender, and the complaints he had made in March 2018 after being passed over for a previous promotion in 2015. But it is uncontroverted that McCormick withdrew his application for Post Commander before it could be considered and his arguments for relief from this requirement of a prima facie case are unavailing. Moreover,

[1] The other two cases are *Hahn v. Gasper*, No. 1:20-cv-403 (W.D. Mich. 2020), and *Caldwell v. Gasper*, 1:20-cv-411 (W.D. 2020). The *Hahn* and *Caldwell* cases contain substantially similar factual allegations and have proceeded together as cognate cases. This case has proceeded separately, although it too contains overlapping factual allegations and claims.

McCormick admits he had an angry attitude and that this attitude affected his professional relationships, which is exactly the reasons superiors gave for concern about promoting him. This is fatal to any claim of pretext. Accordingly, and for the reasons set out more fully below, the Court grants the defense motion for summary judgment and dismisses this case.

BACKGROUND

I. In 2015, McCormick is Passed Over for a Section Commander Position in Internal Affairs.

A. Twana Powell is Selected for the Section Commander Position over McCormick

Michael McCormick is a white male. He began his career with the Michigan State Police in 1990 and was promoted up the ranks in the following years to the level of Lieutenant 14. In September 2015, approximately three and a half years before the promotion decision at issue in this case, he held the position of Acting Section Commander of Internal Affairs. McCormick, along with two other white males at the Lieutenant 14 level, applied for the permanent Section Commander position. Twana Powell, a racial and gender minority, was a fourth applicant. Ms. Powell held the title of detective sergeant, which was a junior position to the other applicants. (Plaintiff Dep. 79, ECF No. 70-5, PageID.634).

Captain Thomas Deasy, Major Greg Zarotney (both white males) and Human Resources Director Stephanie Horton sat on the panel that interviewed the four applicants. They selected Ms. Powell over the other three applicants.

B. The Promotion Decision Affects McCormick's Attitude at Work and Home

McCormick was "crushed" after he was told he was not selected to be Section Commander. He felt that the decision had been made based on race and gender considerations, and not on merit. But he did not file a complaint or take any formal action after being passed over. He continued to work in internal affairs and, he says, continued to perform at high levels based on objective criteria.

And consistent with this assertion, performance evaluations by Twana Powell in 2016 and 2017 rated him "high performing." (ECF No. 70-3). Yet while he did his work, McCormick admitted to feeling angry, anxious, and depressed after Twana Powell was selected over him. These feelings manifested immediately after he did not get promoted. (Plaintiff Dep. 64, ECF No. 72-1, PageID.787). McCormick felt he had been discriminated against on account of race and gender, and he was angry about that. He admitted he was not "able to cope with it very well." (Plaintiff Dep. 71-72, ECF No. 72-1, PageID.788-789). Twana Powell observed as much in one area of her performance evaluations:

> In 2015 a change in command occurred within the section. Lt. McCormick was able to maintain and produce quality work during that time. He understood that changes occur and effectively incorporated the changes into his work routine. *However, Lt. McCormick's effectiveness could be improved by not dwelling on promotions and or assignments not offered to him.*

(ECF No. 70-3, PageID.594) (emphasis added).

Indeed, there is no genuine issue of material fact but that McCormick was dwelling on the past, and that this affected his attitude towards his colleagues in the workplace and his relationship with his family. In his deposition, McCormick stated he was "obsessing" about not being selected "and just being angry over it." McCormick testified his anger grew "to the point to where it was having a negative impact on relationships with people, especially my marriage." (Plaintiff Dep. 71-72, ECF No. 72-1, PageID.789). His anger affected his professional life. (Plaintiff Dep. 64, ECF No. 72-1, PageID.787). He admitted to complaining, on a regular basis and to anyone who would listen, about how he had been passed over for promotion. (Plaintiff Dep. 76-77, ECF No. 72-1, PageID.791-792). Because of these issues, McCormick took a two-week leave of absence in February of 2017 and sought out the assistance of a therapist. He did not tell anyone the reason for his leave. (Plaintiff Dep. 71, ECF No.72-1, PageID.788).

II. McCormick's Attitude Fails to Improve after a Transfer to the Second District's Metro North Division in 2017.

A. The Transfer

When McCormick returned following his leave, he was transferred by Major Zarotney from internal affairs to the Metro North Division in the Michigan State Police's Second District. Major Zarotney testified he made the decision to transfer McCormick "for the good of the section." Zarotney explained that after McCormick had been denied a transfer, McCormick was "performing his functions adequately but he was bringing the section down with his attitude and demeanor." (Zarotney Dep. 21, ECF No. 63-6, PageID.526). Zarotney added that McCormick's colleagues "did not look forward to interacting" with him. (Zarotney Dep. 35, ECF No. 63-6, PageID.527).

B. McCormick's Morale Fails to Improve After the Transfer

While McCormick's work environment may have changed following the transfer, his attitude did not. There is no dispute about this, although McCormick maintains his anger did not impact the quality and performance of his work.

In the Second District, Plaintiff served as an Assistant Post Commander and reported to the Post Commander, First Lieutenant Joseph Brodeur—a white male. The captain of the Second District was Thomas Deasy, one of the individuals who had been on the committee that had selected Powell over McCormick for the Internal Affairs Section Commander position in 2015. Brodeur testified that during command meetings, briefings, and other events, McCormick acted disengaged. During meetings, for example, there would be a roundtable opportunity for each attendee to provide input. McCormick would not contribute. He'd only look up, perhaps grunt, and sit with his arms folded. (Brodeur Dep. 42-43, ECF No. 63-1, PageID.482). McCormick agreed that he would not provide input during the meetings, although he states he was paying attention and there were times where other employees would also not contribute. (Plaintiff Dep.

195, ECF No. 70-5, PageID.644). Brodeur testified that the entire time he was a Post Commander, McCormick acted "exceptionally upset." (Brodeur Dep. 44, ECF No. 63-1, PageID.483). McCormick's "rage" and "distrust" was all consuming, and the attitude affected Brodeur's working relationship with McCormick. (Brodeur Dep. 71, ECF No. 63-1, PageID.489).

Captain Deasy echoed much of Broedeur's testimony in his own deposition. He observed that McCormick did not participate during command meetings. (Deasy Dep. 37, ECF No. 63-3, PageID.499). Deasy was concerned about McCormick's "temper and his constant oversharing with his troopers and his seeming . . . unfounded anger especially at us. I had hardly even worked with [McCormick] but, yet, he was very open with his hatred for the district command at the time." (Deasy Dep. 36, ECF No. 63-3, PageID.498). Deasy would ask others about McCormick, and they'd respond that McCormick did not want to be there, and that he hated the Second District. (*Id.*). Deasy received an anonymous comment that stated the district should "[f]ire Lieutenant McCormick now, he's a leech on morale." (Deasy Dep. 27, ECF No. 63-3, PageID.497). McCormick did not disagree that he did not want to be in the Second District, and said as much to some of his colleagues. (Plaintiff Dep. 194, ECF No. 70-5, PageID.643).

In fact, McCormick does not disagree that the feelings of anger, anxiety, and depression that he felt after Powell was promoted over him continued after he was transferred to the Second District. Indeed, when asked during his deposition when he had demonstrated anger while on the job at the Michigan State Police either toward the people he supervised, or that supervised him, McCormick responded succinctly: "I would say probably on almost a daily basis from September 2015 to the present to one degree or another to one person or another there has probably been an example of that." (Plaintiff Dep. 84, ECF No. 72-1, PageID.794).

III. Alleged Protected Conduct -- March 2018 Worksite Survey Response

In March 2018 McCormick was asked to fill out a worksite survey. (ECF No. 10-2). Surveys are a part of the state police's yearly inspection process of a post or worksite. The surveys are completed by the area employees and can either be submitted signed or anonymously. (Brodeur Dep. 19, ECF No. 63-1, PageID.479). They are reviewed by commanders at the post and district level, as well as by Lansing command. (*Id.* at 19-20).

McCormick completed the survey and in response to one of the questions, McCormick remarked about a "dark underside of the progress and growth of the agency[.]" (ECF No. 10-2, PageID.113). This underside, he explained, was the Michigan State Police's preferences for racial and gender minorities in command positions, a preference that he personally experienced when he was passed over for the promotion in 2015. McCormick wrote, in part:

> The leadership in its efforts to promote "diversity," particularly with respect to promotions involving command officers, has advanced the careers of several members who are either minorities or women. This, too, has created consequences and casualties within the department. Because some of these advancements came about at the expense of the careers of other more qualified and experienced department members who were not of this desired demographic who were undeservedly passed over for the promotion instead. An example of this was my own experience when I was passed over for a section commander position by an African-American female with far less experience and fewer credentials than me for the position. In fact, this person was double-promoted from a detective sergeant position over me—a long-serving (almost 10 years' experience at the time) command officer with nothing but successful and most diversified command officer experience possible—and other lieutenant 14s in what was clearly a blatant example of reverse discrimination and nepotism.

(ECF No. 10-2, PageID.113).

Four months later, in July 2018, Brodeur told McCormick that Captain Deasy would be speaking to him about the survey response. (Am. Compl. ¶ 34, ECF No. 10, PageID.101). That

conversation did not take place, however, and McCormick felt that his survey comments were a "dead issue." (ECF No. 70, PageID.555).

IV. A New Administration's Diversity Initiatives

In January 2019, Gretchen Whitmer took office as Governor of the State of Michigan. Her new administration included Defendant Joseph Gasper, who became the Director of the Michigan State Police. In his Complaint, McCormick alleges that the new administration doubled down on the Michigan State Police's history of diversity initiatives that McCormick complained about in his worksite survey.

For example, McCormick contends that on February 6, 2019, Gasper announced that the number one priority of the agency was "diversity." (Am. Compl. ¶ 37, ECF No. 10, PageID.101). Gasper stated that "diversity" was to be achieved at all levels of the Michigan State Police through the recruiting and promotional processes. (*Id.* at ¶ 39). Gasper reiterated the point at a Spring Director's meeting. (*Id.* at ¶ 41). All this, McCormick contends, was code-speak for the same affirmative action policies that the Michigan State Police had operated under for decades. These polices, he alleges, have just been driven underground by an amendment to the Michigan Constitution and various court rulings. Defendants' policies reached their zenith, McCormick asserts, at an October 8, 2019, fall forum. There Director Gasper commented that the Michigan State Police was "way too white, and way too male" and he released a "Diversity ONE" initiative that would diversify all ranks of the Michigan State Police. (ECF No. 70, PageID.552).

V. McCormick Applies for the Post Commander Position in the Second District

A. The Vacancy

Meanwhile, in May of 2019, Joseph Brodeur was promoted from his Metro North Post Commander position to that of Inspector. Brodeur appointed a black male, Keyonn Whitfield, to

be his acting replacement. (ECF No. 70, PageID.556). Whitfield apparently held the same rank as McCormick—Lieutenant 14—but he had much less experience. Policy dictated, McCormick claims, that the acting command position should have gone to someone with more experience, such as himself, but Whitfield was selected because he was a racial minority. While he decided to apply for the permanent position, McCormick alleges a series of events made it clear to him, that his application would be futile and he would be passed over for the Post Commander position by a minority, as he had four years earlier in Internal Affairs.

B. McCormick Requests Brodeur and Deasy Complete a Recommendation.

After Whitfield's appointment, an opening was posted for the permanent Post Commander position and McCormick decided to apply. McCormick applied because he felt Whitfield was the "heir apparent" but that Whitfield was not qualified for the post. After hearing about McCormick's decision, Brodeur called McCormick to ask why he had applied for the position. McCormick told Brodeur that he was applying "for the benefit and the welfare of the troopers and the sergeants at the post. . . . I did not want to see the heir apparent, which was Lieutenant Whitfield, get the job. I didn't feel he was ready for the position." (Plaintiff Dep. 170, ECF No. 70-5, PageID.639).

Under Michigan State Police policy, McCormick had to include a PD-035 recommendation form completed by his supervisor in his application. The form contained blanks for the supervisor to answer seven questions. On May 8, 2019, both Brodeur and Deasy completed the form. Both Brodeur and Deasy recommended McCormick for the Post Commander position and the completed answers reflect positive assessments on McCormick's abilities. For example, when asked whether McCormick would be able to perform successfully in the position, Brodeur[2] wrote:

[2] Brodeur testified that McCormick filled in the first six, and perhaps the seventh blank as well. (Brodeur Dep. 66, ECF No. 63-1, PageID.486). Still, Brodeur signed his name at the end, indicating he agreed with the answers McCormick provided.

> Yes. Lt. McCormick has a solid foundation in the area of Post Operations. His seven years' experience as an Assistant Post Commander at the Metro North, Brighton, Flint and Detroit posts has solidified the knowledge and experiences he has gained throughout his career. He has demonstrated his ability to run a post.

(ECF No. 10-3, PageID.114).

At the end of the form, Brodeur checked a box indicating that he recommended McCormick for the position. (ECF No. 10-3, PageID.115).[3] Captain Deasy also checked a box indicating that he recommended McCormick for the position. However, in a space provided to explain his recommendation, Deasy stated that his recommendation was not unqualified:

> Lt. McCormick's experience and training qualify him for the position and he is recommended based on the comments by his most recent supervisor. However, my recommendation is not without reservation. He has been disengaged, if not openly disgruntled at times, and appears largely disinterested in being part of the district command team. Further, when not selected in the past he has made unsupported allegations of impropriety and bias rather [than] owning his own failures.

(ECF No. 10-3, PageID.115).

[3] During his deposition, Brodeur testified that, in retrospect, the answers on the PD-035 form are not accurate. He testified that he should have indicated McCormick would not be a successful Post Commander based on McCormick's negative attitude. (Brodeur Dep. 66-67, ECF No. 63-1, PageID.486-487). Indeed, McCormick attaches some text messages between Brodeur and Deasy that reflect that even before completing the PD-035, Brodeur and Deasy were debating how to complete the form. In the text string, the two agree that they are having a hard time recommending McCormick for promotion. They note that one option would be to recommend McCormick for advancement to prevent McCormick "from going completely off the rails." (ECF No. 70-23, PageID.750).

VI. McCormick Withdraws his Application

A. The Alleged Quid Pro Quo

McCormick alleges that at some point during the application process he become aware of a deal orchestrated by Director Gasper to install a racial minority in the Second District command. He was told about this deal from one of his subordinates, Sergeant Weinrick.

It is no secret, McCormick says, that Director Gasper and other command members wanted to increase diversity in the Second District. In May 2019, the inspector position in the Second District opened up (the position that Brodeur ultimately filled). After learning of the vacancy Director Gasper had Major Zarotney call Captain Deasy and discuss a lateral transfer of Inspector James Grady (a black male) into the Second District's inspector position. (Zarotney Dep. 5, ECF No. 70-21, PageID.742). Gasper told Zarotney it would be a good idea to improve the diversity of the command in the Second District. (*Id.* at 6). After Zarotney relayed these remarks to Deasy, Deasy responded that he liked Grady, but he did not think Grady would be a good fit at that point because of some of the undescribed things Grady had done when he was the post commander in Metro South. (*Id.* at 9, PageID.744). Zarotney reported back to Gasper that Deasy had expressed some concerns, but Director Gasper stated that "If James [Grady] wants to go, he's still gonna go." (*Id.* at 11, PageID.745).

But Grady did not go. Zarotney testified that this was because he offered the transfer to Grady and Grady declined because he was not interested. (*Id.*). But McCormick disagrees. He alleges that according to the information he learned from Weinrick, Deasy and Lansing Command reached a quid pro quo deal wherein Lansing would not make Deasy accept Grady and instead Deasy would be permitted to promote Brodeur to Inspector provided that Deasy hire a racial minority to fill Brodeur's vacant Post Commander spot. And according to McCormick the deal

went through, and Lansing Command tipped its hand: Grady did not move; Brodeur was promoted to inspector; and Brodeur appointed Keyonn Whitfield to be the acting Post Commander and the "heir apparent" for the permanent position.

B. McCormick Withdraws His Application

Having heard of the deal, after reviewing the PD-035 form with Deasy's reservations, McCormick withdrew his application. (ECF No. 70-22). He knew, from Sergeant Weinrick, that the application process was rigged to install a racial minority applicant in the position. And he also knew that Captain Deasy would be on the interview panel. The reservations expressed in Deasy's PD-035 form, McCormick believed, were untrue and retaliatory for the comments McCormick had made about the Michigan State Police's diversity initiatives in the March 2018 worksite survey, something that he had previously believed to be a "dead issue."

After McCormick withdrew, Deasy and Brodeur had a text conversation about Deasy's comments in the PD-035 form. Deasy asked Brodeur if he wanted to discuss the situation any further. Broedeur responded that Deasy's comments "were fair and accurate and I am 100% good with it. He earned those comments, he should realize that." (ECF No. 63-2).

Eventually Whitfield's acting Post Commander position became permanent when Whitfield was hired over another, white male, applicant. Whitfield's vacant Lieutenant 14 level position was also filed with a racial minority.

VII. McCormick Transfers Out of the Second District

Initially, McCormick stayed in his Assistant Post Commander position reporting to Whitfield. But in December of 2019, McCormick asked for and received a lateral transfer from the Metro North post to the unit commander position at the Resource Management Unit in Lansing. There he worked in the distribution of uniforms and equipment to department members in the field.

He recently underwent another lateral transfer position to the operations section in Lansing. (Plaintiff Dep. 10, ECF No. 70-5, PageID.631).

PROCEDURAL HISTORY

McCormick filed this action on August 18, 2020. In an Amended Complaint, McCormick raised four counts of discrimination and retaliation against the Michigan State Police and Director Gasper. Counts I and II are raised against Defendant Gasper under 42 U.S.C. § 1983 for reverse race and gender discrimination (Count I) and retaliation (Count II). Counts III and IV are raised against the Michigan State Police under Title VII for reverse race and gender discrimination (Count III) and retaliation (Count IV).

On September 30, 2021, the defense filed a motion for summary judgment in its favor on all four counts. A corrected motion was filed on October 1, 2021. (ECF No. 62). Then, on October 13, 2021, the parties filed a stipulation to dismiss McCormick's Section 1983 retaliation claim against Defendant Gasper. The Court granted the stipulation and dismissed Count II on October 27, 2021. (ECF No. 69). Accordingly, Counts I, III, and IV remain in the case. McCormick responded to the defense motion on October 27, 2021 (ECF No. 70) and the defense replied on November 12, 2021. (ECF No. 72). The Court heard argument on the motion on December 3, 2021, and thereafter took the motion under advisement.

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)).

DISCUSSION

I. Defendants are Entitled to Summary Judgment on McCormick's Reverse Race and Gender Discrimination Claims (Counts I and III)

McCormick first alleges that Director Gasper and the Michigan State Police unlawfully discriminated against him because he was white, and because he was male. His claim against Defendant Gasper is brought under 42 U.S.C. § 1983. The claim against the Michigan State Police is brought under Title VII. The same framework applies to both discrimination claims. *See Sutherland v. Michigan Dep't of Treasury*, 344 F.3d 603, 614 (6th Cir. 2003) (recognizing the applicability of the Title VII framework to Section 1983 cases). A plaintiff has two alternative ways to establish a reverse discrimination claim: through direct evidence or through circumstantial evidence under the *McDonnell Douglas* burden shifting approach. *Brewer v. New Era, Inc.*, 564 F. App'x 834, 841 (6th Cir. 2014). McCormick contends his discrimination claims survive summary judgment under both approaches.[4] For the reasons set out below, however, the Court

[4] In his Amended Complaint, McCormick argued this case should be analyzed under a mixed-motive framework. (Am. Comp. ¶ 75, ECF No. 10, PageID.108). "A plaintiff can characterize a racial discrimination claim as single-motive (i.e., that race was the sole motivating factor) or mixed-motive (i.e., that race was a motivating factor among other, legitimate factors). In addition, a discrimination claim can be supported with direct or indirect evidence of discrimination." *Smith v. City of Toledo*, 13 F.4th 508, 514 (6th Cir. 2021) (internal citation omitted). "[A] Title VII plaintiff asserting a mixed-motive claim need only produce evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) 'race, color, religion, sex, or national origin was *a* motivating factor' for the defendant's adverse employment action." *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008); *see also Ondricko*

finds that Defendants are entitled to Summary Judgment in their favor on both of the discrimination counts.

A. McCormick Does Not Have Direct Evidence of Race or Gender Discrimination

McCormick alleges that Gasper's comment that the Michigan State Police was "way too white and way too male" at the October 8, 2019, fall forum and his statements that the priority of the Michigan State Police was to diversify all ranks is direct evidence of discrimination. (ECF No. 70, PageID.561-563). The Court disagrees.

"Direct evidence is evidence that, if believed, 'requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.'" *Thompson v. City of Lansing*, 410 F. App'x 922, 929 (6th Cir. 2011) (quoting *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir. 2003)); *see, e.g.*, *Johnson v. University of Cincinnati*, 215 F.3d 561, 577 n.7 (6th Cir. 2000) (finding direct evidence of discrimination where a university president allegedly said, "[w]e already have two black vice presidents. I can't bring in a black provost"). Direct evidence must prove not only discriminatory animus, but also that the employer actually acted on that animus. *Amini v. Oberlin Coll.*, 440 F.3d 350, 359 (6th Cir. 2006).

Even accepting Director Gasper's comments at face value, they do not directly prove that McCormick's race and gender was the reason for denying his promotion. Indeed, there would

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v. MGM Grand Detroit, LLC, 689 F.3d 642, 649-52 (6th Cir. 2012) (discussing whether the plaintiff's race and gender discrimination claims should be analyzed under a mixed-motive or single-motive analysis). The defense motion primarily is tailored to a single-motive analyses, though it also addresses a mixed motive theory. McCormick's response brief, however, does not address the mixed-motive framework, and so the Court proceeds under the framework for direct and circumstantial evidence set out above. But regardless of the theory and analysis, the outcome is the same: the evidence fails to create a triable issue of fact on McCormick's claims of discrimination and retaliation.

need to be several inferential steps to arrive at this conclusion. For one thing, McCormick withdrew his application, and so the defense did not have an opportunity to act on the promotion. In addition, as set out below, McCormick does not have admissible evidence that Gasper was a decisionmaker in the promotion decision. Moreover, the comments that McCormick references were, by this own recitation, made during the fall forum October 8, 2019. This was after all the challenged events in this case. Everything McCormick complains about—the 2015 failure to promote; the transfer; the application, Deasy's recommendation reservations; the quid pro quo deal for Whitfield; and the application withdrawal—all came before Gasper allegedly made these remarks and before Gasper allegedly released the diversity initiative. This alone would require an inference that Gasper was ratifying what had been a de facto policy when McCormick initially submitted his application.

Leaving all that to the side, the "way too white, way too male" comment and committement to diversifying "all ranks" of the force, is not direct evidence of discrimination. Rather it is similar to a comment the Sixth Circuit found did not amount to direct evidence of discrimination in *Johnson v. Metropolitan Government of Nashville*, 502 F. App'x 523, 534-35 (6th Cir. 2012). *Johnson*, which was also a case alleging reverse discrimination on failure to promote claims, involved an observation from the police department's spokesperson that "[t]he goal of this police department is to mirror the population of the city to the greatest extent possible . . . When presented with the opportunity to promote bright, qualified minority candidates, you always give those persons consideration." *Id.* at 535. The Circuit found this statement was not direct evidence of discrimination because it would require the court to "ignore the equally available inference that the department was simply aware of a lack of minorities within its upper ranks." *Id.* The Circuit cited other cases where it found "statements reflecting a desire to improve diversity do not equate

to direct evidence of unlawful discrimination." *Id.* (citing *Plumb v. Potter*, 212 F. App'x 472, 477-78 (6th Cir. 2007), for the proposition that "a jury could find that [the employer] believed it was good to have more women working at the [company], yet still conclude that [the decisionmaker] did not let that personal belief interfere with her decision whether or not to promote a woman over [the plaintiff]."). With respect to the diversity initiative, beyond the timing issue, there would need to be an inferential leap that the recruiting targets of a 25% racial minority trooper applicant pool and a 20% female trooper applicant pool (ECF No. 63-4, PageID.507) somehow applied across all posts beyond applicants and into existing members of the force, all the way up to command, and that somehow these targets meant not only promoting diversity, but unlawful quotas.

For all the above reasons, Director Gasper's October 8, 2019, comments do not amount to direct evidence of discrimination in this case.

B. Plaintiff Does Not Have Sufficient Circumstantial Evidence of Race or Sex Discrimination under McDonnell Douglas

Even if he does not have direct evidence of discrimination, McCormick contends he has circumstantial evidence of discrimination under the *McDonnell Douglas* burden shifting approach to hold Director Gasper and the Michigan State Police liable for reverse race and gender discrimination. (ECF No. 70, PageID.564-572). But McCormick cannot point to enough to show Director Gasper was personally involved in the promotion decision to hold him liable under Section 1983. Furthermore, because McCormick withdrew his application for the position, he cannot even make out a prima facie case of discrimination. But even if he could demonstrate a prima facie case, McCormick cannot demonstrate that the nondiscriminatory justifications offered by the defense were pretext for unlawful discrimination.

i. Governing Law

Typically, under *McDonnell Douglas,* a plaintiff alleging a failure to promote discrimination claim must first establish a prima facie case by showing (1) that he was a member of a protected class; (2) that he applied for and was qualified for a promotion; (3) that he was considered for and was denied the promotion; and (4) one or more employees of similar qualifications who were not members of the protected class received promotions at the time the plaintiff's request for promotion was denied. *See Grizzell v. City of Columbus Div. of* Police, 461 F.3d 711, 719 (6th Cir. 2006) (citing *Sutherland v. Michigan Dep't of* Treasury, 344 F.3d 603, 614 (2003)).

"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); *see also Zambetti v. Cuyahoga Cmty, College*, 314 F.3d 249, 255 (6th Cir. 2002). "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." *Leadbetter*, 385 F.3d at 690 (internal citations and quotation marks omitted). "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." *Id.*

Accordingly, in this reverse discrimination failure to promote case, to make out a prima facie case, McCormick must show: "(1) 'background circumstances [to] support the suspicion that the defendant is that unusual employer who discriminates against the majority;' (2) 'that he applied and was qualified for a promotion;' (3) 'that he was considered for and denied the promotion'; and (4) 'that the defendant treated differently employees who were similarly situated but were not

members of the protected class." *Golden v. Town of Collierville*, 167 F. App'x 474, 479 (6th Cir. 2006) (quoting *Sutherland*, 344 F.3d at 614)

"Once plaintiffs establish a prima facie case of discrimination, the burden then shifts to the defendants to articulate some legitimate, nondiscriminatory reason for the defendants' action." *Grizell*, 451 F.3d at 719-20. 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. *Id.* at 720. To survive a motion for summary judgment, the plaintiff must show that "there is sufficient evidence to create a genuine dispute at each stage of the *McDonnell Douglas* inquiry." *Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806, 812 (6th Cir. 2011) (citation omitted).

ii. Plaintiff Cannot Make the Requisite Showing of Personal Involvement as to Defendant Gasper[5]

McCormick's Section 1983 discrimination claim against Director Gasper is subject to dismissal because McCormick does not create a triable issue of fact regarding Gasper's personal involvement in the alleged discrimination. It is well understood that government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior or vicarious liability. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009); *Monell v. New York City Dep't of Soc. Servs*., 436 U.S. 658, 691(1978); *Everson v. Leis*, 556 F.3d 484, 495 (6th Cir. 2009). A claimed constitutional violation must be based upon active unconstitutional behavior. *Grinter v. Knight*, 532 F.3d 567, 575–76 (6th Cir. 2008); *Greene v. Barber*, 310 F.3d 889, 899 (6th Cir. 2002). The acts of one's subordinates are not enough, nor can supervisory liability be based

[5] The parties have not discussed whether Gasper in his official capacity, is subject to Eleventh Amendment immunity on the Section 1983 claim. Moreover, because McCormick's Section 1983 claim against Gasper fails on the merits, the Court need not reach the qualified immunity issue.

upon the mere failure to act. *Grinter*, 532 F.3d at 576; *Greene*, 310 F.3d at 899; *Summers v. Leis*, 368 F.3d 881, 888 (6th Cir. 2004).

Nevertheless, McCormick contends that Defendant Gasper is liable under Section 1983 for two reasons. First Gasper's October 8, 2019, fall forum comments announced an unconstitutional policy directive that resulted in a violation of McCormick's constitutional rights. Second, he says, Gasper orchestrated the quid pro quo deal that ensured the Post Commander position in the Second District would go to a racial minority. Neither argument is sufficient to move a claim against Director Gasper to trial under Rule 56.

In support of his first argument, McCormick references mostly out of circuit authority for the proposition that supervisors might sometimes be liable under Section 1983 if they implemented "unconstitutional policies that causally result in the constitutional injury." *Gates v. Texas Dept of Protective and Regulatory Services*, 537, 404, 435 (5th Cir. 2008). Accepting this proposition for purposes of argument, McCormick cannot demonstrate that Gasper's October 8, 2019, comments meet this standard. McCormick contends that the policy announced on October 8, 2019, is unconstitutional because it is similar, he says, to a policy that was previously declared unconstitutional by a court in this district. (ECF No. 70, PageID.560-561 (citing *Herendeen v. Michigan State Police*, 39 F. Supp. 2d 899 (W.D. Mich. 1999)). But McCormick does not cite any record evidence or provide argument explaining how the policy released on October 8, 2019, is unconstitutional. Gasper's "way too white, way too male" comments do not indicate an announcement that the Michigan State Police was going to affirmatively reduce white males in the force. And so this assertion lacks evidentiary support. Furthermore, as noted above, this statement and the discriminatory policy McCormick alleges, comes *after* everything McCormick contends happened to him here. So, while it may be true that a supervisor may sometimes be liable for

implementing unconstitutional policies that result in a constitutional injury, that cannot be the case here, because the policy Director Gasper allegedly implemented came after the alleged injury.

McCormick's remaining argument regarding Director Gasper's personal involvement fails to create an issue for trial because it is entirely speculative and unsupported by any admissible evidence. It is grounded in anonymous rumor and thus is subject to a hearsay objection at trial. Although the evidence McCormick presents in opposing Defendants' motion for summary judgment need not itself be in a form admissible at trial, he "must show that [he] *can* make good on the promise of the pleadings by laying out enough evidence that *will be* admissible at trial to demonstrate that a genuine issue on a material fact exists, and that a trial is necessary." *Alexander v. CareSource,* 576 F.3d 551, 558 (6th Cir. 2009). The deal that McCormick alleges has no supporting admissible evidence. Deasy denied there was any deal. (Deasy Dep. 46-47, ECF No. 63-3, PageID.501-502). Weinrick, upon which McCormick completely relies, testified only that there were "rumors" there was a deal made to stop Inspector Grady from moving to the Second District provided that there was an African American male or female placed in command of the Metro North district. (Weinrick Dep. 12, ECF No. 70-6, PageID.663). These were only rumors. Weinrick had "no knowledge" of whether the deal included Brodeur being promoted to inspector. (*Id.* at 13). Weinrick admitted that "it's all rumor mill. It's all hearsay, allegations, so on and so forth." (*Id.* at 14). The rumor mill was accurate only "50/50" of the time. (*Id.*). "[Y]ou never know what's the truth." (*Id.*) The rumors that Weinrick heard did not include any names. (*Id.*). And Weinrick could not identify any of the individuals who had told him of this supposed deal. (*Id.* at 15). The only part of the alleged scheme that was presented in the form of admissible evidence was Zartoney's testimony that Gasper was interested in increasing diversity in the Second District and that he asked Major Zarotney to call Deasy and inquire about transferring James Grady

to the inspector position, later noting that if Grady wanted the job, he could have it. This is not enough to demonstrate Gasper had a personal involvement in alleged unconstitutional conduct against McCormick on the Post Commander position before McCormick withdrew his application. Thus the defense is entitled to summary judgment in its favor with respect to Count I of the Amended Complaint.

iii. Plaintiff Cannot Make Out a Prima Facie Case of Reverse Discrimination

The defense is also entitled to summary judgment on Count I, as well as on Count III, because McCormick cannot make out a prima facie case of reverse race or gender discrimination. Here the defense focuses on the first two elements of a prima facie reverse discrimination failure to promote case: background circumstances and application / qualification.

Even if McCormick meets the background circumstances element, and even if he was qualified for the position, McCormick cannot make out a prima facie case because he withdrew his application for the Post Commander position before anyone acted on it. A plaintiff who withdraws an application before it was considered does not demonstrate an adverse employment action in the failure to promote context. *See, e.g., Grier v. Henry Ford Hosp.*, 946 F. Supp. 520, 521 (E.D. Mich. Dec. 3, 1996) (Feikens, J) (no adverse employment action in ADEA case where plaintiff withdrew application); *see also Sanchez v. Univ. of Conn. Health Care*, 292 F. Supp. 2d 385, 394 (D. Conn. 2003) (no adverse employment action in Title VII where the plaintiff withdrew application).

McCormick attempts to tread a narrow path by arguing he should be exempt from this requirement because the writing was on the wall that the position would go to Whitfield, and so further efforts would have been futile. (ECF No. 70, PageID.567-570). Although it is true that failure to apply for a promotion may be excused in some situations, the Sixth Circuit requires that

circumstances must reveal "overwhelming evidence of pervasive discrimination in all aspects of [the employer's] internal employment practices, and [that] . . . any application would have been futile and perhaps foolhardy." *Harless v. Duck*, 619 F.2d 611, 617–18 (6th Cir.1980) *(quoted in Kreuzer v. Brown*, 128 F.3d 359, 364 n.2 (6th Cir.1997)). McCormick cannot come close to meeting this standard.

McCormick depends in large part on the alleged quid pro quo deal to install Whitfield as the "heir apparent" in the position. But as set out above, McCormick's assertion here is based on rumor, and does not amount to evidence at all, let alone overwhelming evidence. That leaves McCormick with assertions about the diversity commitments in the Michigan Police Force and testimony about pressure to hire minority candidates. (ECF No. 70, PageID.553). For example, McCormick points to the testimony of a white male officer, a plaintiff in a companion case, that Gasper announced in February 2019 that diversity was the number one priority of the Michigan State Police. McCormick points to other testimony that the Michigan State Police would sometimes wait to post vacancies until a minority candidate had obtained enough years of service so as to apply for the position. But, as with the case of Sgt. Weinrick, much of this seems to be speculating from vague deposition testimony that itself was heard from others. For example, William Sands testified he heard about a list of minority officers who did not have enough years of service to be promoted from Major Zarotney. Mr. Sands testified he never saw the list, and only heard about it from Major Zarotney. (Sands Dep. 70-13, PageID.704). McCormick does not cite to any deposition testimony from Major Zarotney, however, about the list. The Court concludes that McCormick does not have sufficient evidence of pervasive discrimination to excuse the application requirement.

Alternatively, McCormick argues that the reservations in Deasy's recommendation amount to an adverse employment action. (ECF No. 70, PageID.569). The Court is not persuaded. In the discrimination context, an adverse employment action is a "materially adverse change in the terms or conditions . . . of employment because of [the] employer's conduct." *Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 182 (6th Cir. 2004). Whether something constitutes an adverse employment action is viewed objectively, and the question is whether the employment action was "objectively intolerable to a reasonable person." *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 539 (6th Cir. 2002). The reservations in Deasy's letter, which ultimately did not preclude Deasy from recommending McCormick for the position, do not meet this standard.[6]

iv. Assuming McCormick Makes A Prima Facie Case, the Defense has Satisfied its Burden at the Next Stage.

Even if McCormick satisfies a prima facie case of failure to promote reverse discrimination, Defendants contend they have a legitimate, non-discriminatory reason for the reservations in the PD-035: namely, personality conflicts stemming from McCormick's attitude and demeanor towards his colleagues and supervisors. (ECF No. 63, PageID.463).

McCormick contends this is not a legitimate basis because the personality conflicts arose due to Defendants' discriminatory conduct towards him in the decision not to promote him in 2015. But McCormick never lodged a complaint about that employment decision. And his attitude by no means was constrained to those who were involved in the promotion decision. McCormick admits that he expressed his anger towards anyone who would listen. The cases cited by

[6] It is true that negative references might sometimes amount to adverse employment actions, but those circumstances are reserved for claims of retaliation, which involve a broader standard for adverse employment action. *See White v. Adena Health Sys.*, No. 2:17-CV-593, 2018 WL 3377087, at *7 (S.D. Ohio July 11, 2018). *Taylor v. Geither*, 703 F.3d 328, 339 (6th Cir. 2013), for example, involved a claim for retaliation, and thus is distinguishable for purposes of McCormick's discrimination claims.

McCormick are not on point, and generally analyze such a claim in the pretext stage. *See, e.g.*, *McKenna v. Weinberger*, 729 F.2d 783, 789 (D.C. Cir. 1984) (noting that the defendant in fact *had* met its burden of rebutting a prima facie case.). Thus the Court finds the defense has satisfied its burden at this second step.

v. McCormick Fails to Demonstrate that the reason offered for Defendants Actions were Pretext for Unlawful Discrimination

At this point, the burden shifts back to McCormick to demonstrate pretext. "A plaintiff will usually demonstrate pretext by showing that the employer's stated reason for the adverse employment action either (1) has no basis in fact, (2) was not the actual reason, or (3) is insufficient to explain the employer's action." *White*, 533 F.3d at 393. 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).

It is not precisely clear which of these three avenues McCormick is advancing but it appears to be a mix of the second and third. He lists a series of references to his work performance all of which, he says, demonstrate his anger about the diversity initiative did not affect his job performance and the quality of his work. (ECF No. 70, PageID.571-572). But nothing here would demonstrate that the reservations in Deasy's PD-035 form were pretext. Deasy did not say McCormick was an unproductive worker or producing low quality work. Indeed he stated he agreed with Brodeur's positive remarks about McCormick's work product. The problem for Deasy was McCormick's attitude at work that was "a leech on morale." Nothing McCormick lists here demonstrates that this observation was in any way pretext. McCormick says he was able to compartmentalize his anger to his personal life (ECF No. 70, PageID.572). But in his cited deposition testimony, McCormick was careful to qualify that his anger had no impact on the quality

of his work, not that it had no impact whatsoever on his professional life. (Plaintiff Dep. 193, ECF No. 70-5, PageID.642). And he previously testified that "I would say probably on almost a daily basis from September 2015 to the present to one degree or another to one person or another there has probably been an example" of demonstrating anger on the job. (Plaintiff Dep. 84, ECF No. 72-1, PageID.794). And this not a case of a personality conflict sparked by the employer's hostile and offensive remarks. Plaintiff's negative attitude, by his own words, was directed not just at Deasy, the individual who had sat on his 2015 interview panel. Rather, he would complain to anyone who would listen. It is also entirely understandable that an employer would decide not to promote someone to leadership of a district the person repeatedly demonstrated he did not respect or want to be a part of.

II. Defendants are Entitled to Summary Judgment on McCormick's Retaliation Claim (Count IV).

Finally, in Count IV, McCormick alleges that the Defendants retaliated against him for the complaints he made in the March 2018 worksite survey. The defense seeks summary judgment on the basis that the worksite survey is not protected conduct. Even if the survey is protected conduct, the defense contends McCormick cannot meet the causation requirement of a prima facie case or demonstrate pretext. McCormick responds that he has direct and circumstantial evidence in support of a Title VII retaliation claim. The defense has the better argument.

Title VII prohibits employers from retaliating against employees for opposing actions the statute makes unlawful. 42 U.S.C. § 2000e-3. "An employee has engaged in opposing activity when she complains about unlawful practices to a manager, the union, or other employees. *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 516 (6th Cir. 2009). As with discrimination claims, a plaintiff raising a Title VII retaliation claim can proceed under both direct and circumstantial evidence

theories. *Imwalle v. Reliance Medical Products, Inc.*, 515 F.3d 531, 538 (6th Cir. 2008). McCormick claims he can proceed under both theories, and the Court addresses each in turn.

A. McCormick Does Not Have Direct Evidence of Retaliation

McCormick first claims that Deasy's recommendation, with reservations, for the Post Command position in the PD-035 is direct evidence of retaliation. "For a plaintiff to prevail under a theory of direct evidence of retaliation, he would have to show both 'blatant remarks' revealing the defendant's retaliatory intent and that the retaliatory intent was a motivating factor in the defendant's adverse employment action toward him." *Kostic v. United Parcel Service, Inc.*, 532 F. Supp. 3d 513 (M.D. Tenn. 2021) (citing *Mansfield v. City of Murfreesboro*, 706 F. App'x 231, 235-36 (6th Cir. 2017)); *see also Sharp v. Aker Plant Servs. Grp., Inc.*, 726 F.3d 789, 798 (6th Cir. 2013).

McCormick does not satisfy this standard. Deasy's PD-035 comments merely reflect that McCormick had complained about not being promoted in 2015. There is nothing blatant that would demonstrate, without the need of any inference, that Deasy was motivated by McCormick's complaints in the 2018 worksite survey to include his reservations. An equally plausible inference is that Deasy was simply referencing the comments of McCormick's colleagues, who found his negative attitude to be a leech on morale.

Accordingly, the Court concludes that McCormick does not have direct evidence of retaliation.

B. McCormick Has Not Pointed to Circumstantial Evidence of Retaliation

McCormick fares no better on his circumstantial evidence theory. Here, courts apply the familiar *McDonnell Douglas* burden shifting framework. Under this process, the plaintiff must first demonstrate a prima facie case by showing that:

> (1) []he engaged in activity protected by Title VII; (2) the defendant knew of [his] exercise of protected rights; (3) the defendant subsequently took an adverse employment action against the plaintiff or subjected the plaintiff to severe or pervasive retaliatory harassment; and (4) there was a causal connection between the plaintiff's protected activity and the adverse employment action.

Id.

If a plaintiff establishes a prima facie case of retaliation, the analysis proceeds much as it does on a discrimination claim. The burden shifts to the defendant to show a legitimate, non-retaliatory reason for the adverse action. *Montell v. Diversified Clinical Services, Inc.*, 757 F.3d 497, 504 (6th Cir. 2014). If the defendant makes this showing, the burden shifts back to plaintiff to produce evidence of pretext. *Id*. As with a discrimination claim, a plaintiff may show pretext by demonstrating that (1) the employer's stated reason for the adverse action has no basis in fact; (2) the reason offered was not the actual reason; or (3) the reason offered is inadequate to explain the action. *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 545 (6th Cir. 2008). A but-for causation standard applies to Title VII retaliation claims. *University of Texas v. Nasser*, 570 U.S. 338, 133 S. Ct. 2517, 2533 (2013). This standard "requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Id.*; *Montell* at 504.

The Court need not decide whether McCormick's worksite survey response constitutes protected conduct under Title VII.[7] Even if it does, McCormick cannot show a causal connection between the responses and his failure to be promoted in May 2019. The reason why this is so is patent: Defendants could not act on McCormick's application—one way or the other—because he

[7] The invited response would not constitute speech protected by the First Amendment. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 542 (6th Cir. 2007). McCormick has voluntarily dismissed Count II of the Amended Complaint which raised a First Amendment claim.

withdrew his application before it could be considered. On these facts, there is no way McCormick can demonstrate that the decision to install Whitfield in the Post Commander was retaliation for McCormick's complaints in 2018.

To the extent McCormick depends upon the reservations in the PD-035, rather than the hiring selection, such comments might constitute an adverse employment action. *See Taylor v. Geither*, 703 F.3d 328, 339 (6th Cir. 2013). But McCormick cannot demonstrate the causal connection to demonstrate the comments were retaliatory for the survey response made over a year earlier. The lapse of time, over a year, defeats any causation based on temporal proximity. *See Blizzard v. Marion Tech. Coll.*, 698 F.3d 275, 289 (6th Cir. 2012) (noting that a period of more than a year between the protected activity and adverse employment action did not "raise the inference that the protected activity was the likely reason for the adverse action.").

It is true a plaintiff can sometimes still prevail if he "couple[s] temporal proximity with other evidence of retaliatory conduct to establish causality." *George v. Youngstown State University*, 966 F.3d 446, 460 (6th Cir. 2020). But there is no other evidence of retaliatory conduct here. McCormick's contention that the PD-035 was the first opportunity for Defendants to retaliate is not persuasive. McCormick was transferred to the Second District in 2017. At that time, Deasy was the Commander of the District. Deasy was also the commander of the District in 2018, when McCormick completed his survey results. There was ample time and opportunity, in other words, for Deasy to retaliate against McCormick for his survey responses. Deasy could have, for example, fired McCormick or disciplined him after one of the many meetings where McCormick expressed anger towards his colleagues.

McCormick also claims he has met the causation element because he has evidence of a pattern of Defendants' retaliatory behavior. He asks the Court to take judicial notice of the

assertions in the companion Hahn and Caldwell cases, namely, that the disciplinary charges against Hahn and Caldwell were filed in retaliation for an email Hahn sent to Caldwell complaining about the diversity, and that Caldwell faced a perjury charge in retaliation for his deposition testimony. McCormick further points the Court to the testimony of his subordinate who testified that retaliation was rife in the Second District. Much of this consists of assertions made in the pleadings in the Hahn and Caldwell cases and is not based on deposition testimony or other evidence. The Court has, furthermore, granted the defense motion for summary judgment on the retaliation claims in the Hahn and Caldwell cases. The assertions of retaliatory behavior which does have evidentiary support are largely vague and conclusory. The Court finds this insufficient to meet McCormick's burden of demonstrating causation.

But even if McCormick could point to enough to make out a prima facie case of retaliation, he has utterly failed to demonstrate that Deasy's reservations were pretext for retaliation. By his own words, McCormick acted with anger towards his colleagues and expressed that he did not want to be in the Second District. Thus he fails to show that the stated reason in the reservations had no basis in fact. Nor does he demonstrate that his attitude was not the actual reason or was inadequate to explain Deasy's reservations.

Accordingly, the defense is entitled to summary judgment in its favor on McCormick's retaliation claim.

CONCLUSION

McCormick may have thought it was déjà vu all over again when he heard a rumor about a deal to install a racial minority as Post Commander in the Metro North Division. Acting on that rumor, he withdrew his application for the position. That was his decision to make, but he cannot now claim—and support the claim with admissible evidence—that the 2019 promotion decision

was discriminatory or retaliatory in any way. By all accounts, McCormick let his negative attitude get in the way of what has in all other respects been a successful career. This is what Deasy reflected in his reservations. It does not amount to discrimination or retaliation.

ACCORDINGLY, IT IS ORDERED that Defendants' Corrected Motion for Summary Judgment (ECF No. 62) is **GRANTED.**

IT IS FURTHER ORDERED that this case is **DISMISSED.** A separate judgment shall issue.

Dated: December 27, 2021

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