

NO. 89377-2

SUPREME COURT OF THE STATE OF WASHINGTON

KATHRYN SCRIVENER,

Petitioner,

v.

CLARK COLLEGE,

Respondent

**RESPONDENT'S ANSWER TO WASHINGTON EMPLOYMENT
LAWYERS ASSOCIATION'S SECOND AMICUS CURIAE BRIEF**

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I. INTRODUCTION

Amicus Washington Employment Lawyers Association's ("WELA's") second amicus brief presents little argument regarding the two issues that are properly before this Court. Regarding the first issue—what showing a plaintiff must make to establish “pretext”—there is no substantive disagreement between the parties. Regarding the second—whether Ms. Scrivener has established pretext in this case—WELA presents minimal argument and does nothing to dispute that Washington law, federal law, and Washington public policy all demonstrate that statements expressing a desire to increase diversity are not evidence that an employer used unlawful means to accomplish that goal.

Rather than dedicate its brief to issues that are properly before the Court, WELA raises arguments that are not within the scope of issues for which review was granted in this case and were not raised before the courts below. These arguments are significant in scope: WELA asks this Court to overrule no less than three of its prior decisions, all of which have served as the bedrock of Washington employment discrimination for over a decade without incident. This Court should decline WELA's request to overturn prior precedent and institute a sea of change in Washington law that is not properly before this Court and is without legal support.

II. ARGUMENT

A. Statements Expressing A Desire To Increase Diversity Are Insufficient To Establish Pretext Under This Court's Long-Standing Precedent

1. There Is No Substantive Disagreement Regarding What A Plaintiff Must Show To Establish Pretext

The first of the two issues presented by this case is what showing a plaintiff must make to establish “pretext,” thus satisfying the third step in the four-step burden-shifting analysis that applies to employment discrimination cases on summary judgment. WELA argues that the Court of Appeals applied an incorrect “only factor” test in determining that Ms. Scrivener did not meet her burden.¹ WELA misstates the test applied by the court. As Clark College (the “College”) noted in its Supplemental Brief, there is in truth no substantive disagreement between the parties or the courts on this issue.²

Under Washington law, “[a] plaintiff establishes pretext by showing that the employer’s reasons for the allegedly discriminatory action are unworthy of credence or that the decision . . . was more likely than not motivated by discriminatory reasons.”³ This does not require a showing that discrimination was the only factor motivating the

¹ Washington Employment Lawyers Association Amicus Curiae Brief (“2d Amicus Br.”) at 11-13.

² Supplemental Brief of Respondent (“Supp. Br. of Resp’t”) at 9-12.

³ *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 643 n.32, 911 P.2d 1319 (1996) (citing *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)).

employment action. Nor did the Court of Appeals require such a showing in this case. Rather, the court properly found that the scant evidence presented by Ms. Scrivener was insufficient to establish pretext. The court's conclusion was correct and should be affirmed.

2. Washington Law, Federal Law, And Washington Public Policy All Demonstrate That Statements Supporting Diversity Do Not Establish Pretext

The second of the two issues presented by this case is whether Dr. Branch's comments expressing a commitment to, and a desire to increase, diversity established pretext in this case. The College demonstrated in its Supplemental Brief that, under Washington law, statements that do not evidence discriminatory animus, are unrelated to the plaintiff's qualifications as an employee, and are made months before the challenged employment decision—i.e., comments such as Dr. Branch's—do not establish pretext.⁴ WELA has neither cited contrary Washington authority nor distinguished the authorities cited by the College.

The College also demonstrated in its Supplemental Brief that federal courts, the decisions of which are persuasive authority here, have consistently held that statements expressing a desire to increase diversity—i.e., comments such as Dr. Branch's—do not establish pretext.⁵ WELA has cited no contrary authority, likely because countless federal

⁴ Supp. Br. of Resp't at 13 & n.34-n.37 (collecting cases).

⁵ Supp. Br. of Resp't at 13-14 & n.38 (collecting cases).

courts have rejected on summary judgment plaintiffs' attempts to rely upon such statements to prove discrimination—whether presented in terms of direct evidence or pretext.⁶ The reasoning of these cases is simple: An employer's stated desire to increase diversity is not evidence that an employer has chosen to use *unlawful* means to obtain that goal rather than use one of the numerous *lawful* means⁷ available to reach that goal.

⁶ In addition to the cases cited in the College's Supplemental Brief, *see, e.g., Axel v. Apfel*, 118 Fed. Appx. 677, 678 (4th Cir. 2004) ("The district court also correctly held that gender discrimination could not be supported because plaintiffs were unable to establish causation. That is to say, there is no proof that the promoting authority relied on the Affirmative Employment Plan in making the selections which are complained of here."); *Silver v. City Univ. of New York*, 947 F.2d 1021, 1022 (2d Cir. 1991) ("The principal evidence of such a motive is an internal CUNY memorandum stating that lists of candidates for Distinguished Professor 'should include a very significant representation of minorities and females.' However, the memorandum in no way suggests that the appointment of Distinguished Professors should, or would, be race- or gender-based."); *Ramsey v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 11-3862, 2013 WL 1222492, at *26 (N.D. Ga. Jan. 30, 2013) ("Georgia Tech's published statements related to its commitment to diversity do not establish pretext. Indeed, similar statements could be found at almost any other major institution of higher learning."), *aff'd* ___ Fed. Appx. ___, 2013 WL 5932000 (11th Cir. 2013); *Maples v. City of Columbia*, No. 07-3568, 2009 WL 483818, at *8 (D.S.C. Feb. 23, 2009) ("Although Anderson made comments about diversity, Maples has not shown that Anderson recommended Floyd for the Fire Marshal position because of her race and/or gender."); *Blanke v. Rochester Tel. Corp.*, 36 F. Supp. 2d 589, 597-98 (W.D.N.Y. 1999) ("The statements articulating RTC's broad goal of increasing the number of minority employees within its ranks contain no suggestion that white employees would be terminated in order to effectuate that goal."); *Payne v. Norwest Corp.*, 911 F. Supp. 1299, 1306 (D. Mont. 1995) ("[E]vidence of these recommendations or goals [regarding increasing diversity] does not even give rise to an inference that Payne himself was fired on account of his race."), *rev'd in part on other grounds*, 113 F.3d 1079 (9th Cir. 1997). Citation to unpublished federal opinions is permitted. GR 14.1(b). Pursuant to GR 14.1, copies of *Ramsey* and *Maples* are attached to this Answer as Appendices A and B.

⁷ *See, e.g.,* Washington State Minority and Justice Commission, *Building a Diverse Court: A Guide to Recruitment and Retention*, at 46-93 (detailing numerous strategies for increasing workplace diversity *other than* unlawfully considering an individual's protected class when making a hiring decision), *available at* <http://www.courts.wa.gov/committee/pdf/Buidling%20a%20Diverse%20Court%20RR%20Manual%202nd%20Ed.pdf>.

a. Dr. Branch Never Stated A “Hiring Preference” For Younger Employees

Unable to cite any case where statements such as Dr. Branch’s have been held to establish pretext, WELA instead presents three arguments. The first is to inaccurately describe Dr. Branch’s statement at issue in this case. Despite WELA’s repeated assertions to the contrary,⁸ Dr. Branch did *not* state a preference for “hiring younger faculty.” In fact, the words “hire” or “hiring,” or any reference to the hiring process, are wholly absent from Dr. Branch’s statement. CP at 24. There is no support in the record for WELA’s contrary assertions.

b. California Does Not Permit All Cases Involving Comment Related To A Protected Class To Automatically Survive Summary Judgment

Second, citing the California Supreme Court’s decision in *Reid v. Google Inc.*,⁹ WELA asks this Court to follow the alleged “California” approach to this issue, and hold that any comment regarding a protected class is sufficient to survive summary judgment.¹⁰ This argument misstates the California Supreme Court’s holding in *Reid*. In *Reid*, the California Supreme Court did not, as WELA asserts, reject the “stray remarks” doctrine or hold that any comment related to a protected class is

⁸ *See, e.g.*, 2d Amicus Br. at 5 (“explicitly stated his preference for hiring younger faculty”), 18 (“In this case, the discriminatory comments were related to the decision to hire new faculty”), 19 (“the President’s comments in favor of hiring younger employees”).

⁹ 50 Cal. 4th 512, 235 P.3d 988 (2010).

¹⁰ 2d Amicus Br. at 16-19.

sufficient to defeat summary judgment. Rather, *Reid* rejected the “*strict application* of the stray remarks doctrine, as urged by Google,” which “would result in a court’s categorical exclusion of evidence even if the evidence was relevant.”¹¹ In doing so, *Reid* held that discriminatory remarks should be considered in context, with all of the evidence in the record.¹² *Reid* also affirmed the “‘common-sense proposition’ that [even] a slur, in and of itself, does not prove actionable discrimination.”¹³ “But when combined with *other evidence of pretext*, an otherwise stray remark *may* create an ensemble that is sufficient to defeat summary judgment.”¹⁴

As both *Reid*’s express language and subsequent cases applying *Reid* confirm, *Reid* does not prohibit summary judgment in all cases where there are comments—even *discriminatory* comments—concerning protected classes.¹⁵ Rather, *Reid* rejected a “*strict application* of the stray remarks doctrine” that is not the law in Washington, not advocated by the College, and not relevant to this case.

¹¹ *Reid*, Cal. 4th at 539 (emphasis added).

¹² *Id.* at 538.

¹³ *Id.* at 541.

¹⁴ *Id.* at 542 (quotation marks, alterations, and emphasis omitted and added).

¹⁵ See, e.g., *Korte v. Dollar Tree Stores, Inc.*, No. 12-541, 2013 WL 2604472, at **13-14 (E.D. Cal. June 11, 2013) (applying California law, considering *Reid*, and granting summary judgment in age discrimination cases despite comments such as employees being “too old and stupid,” “too old school,” and “not going to change”); *Holtzclaw v. Certaineed Corp.*, 795 F. Supp. 2d 996, 1013-14 (E.D. Cal. 2011) (applying California law, considering *Reid*, and granting summary judgment in age discrimination cases despite comments regarding plaintiff’s age and suggestions that he retire). Pursuant to GR 14.1, a copy of *Korte* is attached to this Answer as Appendix C.

c. Existing Case Law Holding That Comments Supporting Diversity Do Not Establish Pretext Are Based On A Lack Of Causation, Not On A Justification Of Affirmative Action

Third, WELA seeks to distinguish the cases cited by the College that have held that comments such as Dr. Branch's do not establish pretext. According to WELA, those cases are inapplicable because they did not deal with age discrimination and the challenged comments in those cases were made in favor of a "protected class of employees."¹⁶ Thus, the comments in those cases were made pursuant to "affirmative action" programs.¹⁷ WELA's argument is based on a misreading of both the scope of anti-discrimination laws as well as the College's cited authorities.

While a full discussion on the legality of affirmative action is well beyond the scope of issues before the Court in this case, it is well-established that the protections of anti-discrimination laws are not limited to members of historically disadvantaged groups.¹⁸ Since the passage of Initiative 200, this has been particularly true with respect to public employment in Washington.¹⁹ Anti-discrimination laws protect all persons equally. WELA's passing suggestions, without citation to

¹⁶ 2d Amicus Br. at 19.

¹⁷ *Id.*

¹⁸ *McDonald v. Santa Fe Trail Trnasp. Co.*, 427 U.S. 273, 295-96, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976) (holding that Title VII does not only prohibit discrimination against historically disadvantaged classes).

¹⁹ RCW 49.60.400 (prohibiting preferential treatment based upon protected classes).

authority, that affirmative action might justify adverse employment actions against historically advantaged classes based on their protected characteristics is thus without legal support.

More importantly, however, none of the cases cited by the College based their holdings upon affirmative action justifying race- or gender-based adverse employment actions. Rather, those cases based their holdings on the lack of a causal connection between the plaintiff's protected class and the challenged employment action.²⁰ In other words, an employer's stated desire to increase diversity is not evidence that an employer has chosen to use *unlawful* means to obtain that goal rather than one of the numerous *lawful* means²¹ available at its disposal to reach that goal. WELA has presented neither authority nor argument to undermine this common sense proposition, which is supported by Washington law, federal law, and Washington public policy.

Simply stated, there is no basis for treating comments regarding diversity in age differently from comments regarding diversity in other characteristics. In fact, courts have not hesitated to grant or affirm summary judgment even when age-related comments are made without

²⁰ Supp. Br. of Resp't at 13-14 & n.34-n.38 (collecting cases).

²¹ See, e.g., Washington State Minority and Justice Commission, *Building a Diverse Court: A Guide to Recruitment and Retention*, at 46-93.

any reference to diversity.²²

WELA does not dispute that Washington has a strong public policy supporting diversity, including in the workplace. Nor can it dispute that an adverse holding in this case would seriously undermine that policy. As one court has stated, “[T]he law allows and even encourages [class] neutral methods to achieve diversity. . . . [T]o use diversity concerns, without more, as evidence of discrimination would be irresponsible.”²³ This Court should affirm the dismissal of Ms. Scrivener’s age discrimination claim, which is principally based on Dr. Branch’s statement supporting diversity.

3. Dismissal Was Also Appropriate Under The Fourth Step Of The Burden Shifting Analysis

Should this Court find that Ms. Scrivener has established pretext, the remedy would not be to remand this case for a trial on the merits, as WELA suggests.²⁴ Rather, the Court should then affirm the dismissal of Ms. Scrivener’s claim on the alternative basis that she has not satisfied the

²² *Berquist v. Wash. Mut. Bank*, 500 F.3d 344, 351 (5th Cir. 2007) (holding that statement regarding the desire to “attract younger talent” was not evidence of age discrimination); *Mereish v. Walker*, 359 F.3d 330, 336-37 (4th Cir. 2004) (holding that statement regarding the “problem” of the “average age going higher” was not evidence of age discrimination); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 512 (4th Cir. 1994) (holding that statement that “there comes a time when we have to make way for younger people” was not evidence of age discrimination).

²³ *Opsatnik v. Norfolk S. Corp.*, No. 06-81, 2008 WL 763745, at *10-*11 (W.D. Pa. Mar. 20, 2008), *aff’d* 335 Fed. Appx. 220 (3rd Cir. 2009). Pursuant to GR 14.1, a copy of *Opsatnik* is attached to this Answer as Appendix D.

²⁴ 2d Amicus Br. at 1 (“[T]his Court should reverse the lower courts and remand for a trial on the merits.”), 5 (same), 20 (same).

fourth step of the burden-shifting analysis, which neither WELA nor Ms. Scrivener has mentioned.²⁵ At that step, a reviewing court also considers “evidence that supports the employer’s case,”²⁶ to determine whether the full record permits a reasonable inference of discrimination.²⁷

As the College explained in its Supplemental Brief, due to the College’s evidence, including but not limited to the application of the “same actor inference,” a reasonable inference of discrimination is not present in this case.²⁸ Thus, should the Court find pretext, the appropriate remedy would be to affirm dismissal on an alternative basis, not to remand for a trial on the merits.

B. WELA’s Remaining Arguments Are Not Properly Before The Court And Lack Legal Support

The remaining arguments raised by WELA violate either, or both, of two well-established limitations on the scope of review in cases before this Court. The first is that “the Supreme Court will review only the questions raised in . . . the petition for review . . . , unless the Supreme Court orders otherwise upon granting of the . . . petition.” RAP 13.7(b). To be properly raised in a petition for review for the purposes of RAP

²⁵ Supp. Br. of Resp’t at 19-20.

²⁶ *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 186 (quotation marks omitted) 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 228, 137 P.3d 844 (2006).

²⁷ *Hill*, 144 Wn.2d at 186.

²⁸ Supp. Br. of Resp’t at 19-20.

13.7(b), an issue must be listed in a petition's concise statement of issues presented for review.²⁹ Ms. Scrivener's concise statement of issues in her petition for review was limited to the proper articulation and application of the pretext standard, and the order granting review in this case did not expand the issues to be considered. Thus, the issues properly before this Court are limited to those concerning the proper articulation and application of the pretext standard.

Further, it is axiomatic that, when reviewing a summary judgment decision, this Court will not review issues not raised before the trial court.³⁰ Issues that were not raised before the trial court are thus not properly before this Court. Each of the remaining issues raised by WELA violates one or both of these rules.

1. There Is No Employment Discrimination Exception To Well-Established Summary Judgment Standards

WELA argues that “summary judgment is generally an inappropriate vehicle” for resolving employment discrimination claims.³¹

²⁹ *State v. Korum*, 157 Wn.2d 614, 623-25, 141 P.3d 13 (2006) (holding that issue raised in petition's argument section, but not in the concise statement of issues presented for review required by RAP 13.4(c)(5), was not sufficiently raised for purposes of RAP 13.7(b)); *State v. Collins*, 121 Wn.2d 168, 178-79, 847 P.2d 919 (1993) (declining to consider issue raised in petition's argument section but not in concise statement of issues presented for review where “[f]rom the issue section alone, it [was] impossible to tell that the [issue was] implicated in this case”).

³⁰ RAP 9.12 (“On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.”); *see also* RAP 2.5(a).

³¹ 2d Amicus Br. at 5-7.

This argument does not pertain to the articulation or application of the pretext standard, and is not properly before this Court.

Nonetheless, this argument is curious given WELA's concession that "a different summary judgment standard does not apply for discrimination cases,"³² an appropriate concession given that this Court has held that "courts should not treat discrimination differently from other ultimate issues of fact."³³ As the College noted in its Supplemental Brief, it is now well-established that prior dicta cautioning against granting summary judgment in employment discrimination cases have been previously misconstrued, subsequently disavowed, and do not require the application of a different summary judgment standard in practice.³⁴

WELA states that *despite* the summary judgment standard being the same for employment discrimination and other cases, "the application of that standard is more difficult when motive is the central factual

³² *Id.* at 6.

³³ *Hill*, 144 Wn.2d at 185 (quotation marks omitted).

³⁴ Supp. Br. of Resp't at 7 & n.7-n.9 (collecting cases). *See also Alexander v. Wis. Dep't of Health and Family Servs.*, 263 F.3d 673, 681 (7th Cir. 2001) ("Thus, regardless of our inclusion of the phrase 'added rigor' in prior cases, we review a district court's decision to grant a motion for summary judgment on a claim involving issues of employment discrimination as we review any case brought before this court involving the review of a grant of summary judgment."); *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 466 (2d Cir. 2001) ("It is now beyond cavil that summary judgment may be appropriate even in the fact-intensive context of discrimination cases. This Court has stated that: the salutary purposes of summary judgment—avoiding protracted, expensive and harassing trials—apply no less to discrimination cases than to . . . other areas of litigation. [T]rial courts should not treat discrimination differently from other ultimate questions of fact." (citations and quotation marks omitted)).

issue.”³⁵ This is an empirical, not legal, question: Applying traditional summary judgment standards, are employment discrimination cases *in fact* more likely to survive summary judgment than other cases? WELA cites no authority for its proposition that the answer to this question is “yes.” Nor does any authority appear to exist.

To the contrary, data indicates that a large majority of summary judgment motions are granted in employment discrimination cases.³⁶ This high dismissal rate is not cause for alarm. Rather, it reflects the fact that there are significant incentives to settle early during litigation discrimination cases that present a material risk of summary judgment being denied due to the fact that employment cases are time-consuming and costly to defend,³⁷ and the fact that a successful plaintiff is entitled to recover his or her attorneys’ fees.³⁸ These incentives are supported by data, as a majority of employment discrimination cases settle,³⁹ and there

³⁵ 2d Amicus Br. at 6.

³⁶ Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Judge Michael Baylson, U.S. Dist. Court for the E. Dist. of Pa. (rev. June 15, 2007), *available at* <http://ftp.resource.org/courts.gov/fjc/sujufy06.pdf> (indicating that 73 percent of summary judgment motions are granted in employment discrimination cases).

³⁷ *See Greer v. Bd. of Educ. Of Chicago*, 267 F.3d 723, 727 (7th Cir. 2001) (“Employment cases are extremely fact-intensive[.]”); *cf. Ockeltree v. Franciscan Health Sys.*, ___ Wn.2d ___, 317 P.3d 1009, 1024 (2014) (“Discrimination suits place a heavy financial and legal burden on these comparatively fragile employers[.]” (Stephens, J., dissenting)).

³⁸ RCW 49.60.030(2).

³⁹ Peter Siegelman & John J. Donohue, III, *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis*, 24 J. Legal Stud. 427, 449-50 (1995) (noting that between 61.3 percent and 67.7 percent of employment discrimination cases settle).

is evidence suggesting that dismissal rates are higher when mediation is required prior to the filing of a motion for summary judgment.⁴⁰

WELA cites no authorities to counter these facts. Instead, it cites a Seventh Circuit case that dealt with an evidentiary issue at trial,⁴¹ a phantom quote from a Washington Court of Appeals case that does not actually appear in the cited case,⁴² cases that stand for the non-controversial proposition that when there are reasonable, competing inferences of discrimination and nondiscrimination that summary judgment should be denied,⁴³ and other cases that stand for the non-controversial proposition that little evidence *may be*, but is not *always*, sufficient to defeat summary judgment.⁴⁴ None of these cases undermine WELA's concession that the same summary judgment standards apply to employment discrimination and other cases. And none of these cases provide any support for WELA's empirical assertion that summary judgment is generally denied in employment discrimination cases.

In any lawsuit, the purpose of summary judgment is "*to examine*

⁴⁰ See Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Judge Michael Baylson, U.S. Dist. Court for the E. Dist. of Pa. ("Some of the districts with high rates of motions granted also have ADR procedures that resolve many cases before a summary judgment motion is filed.").

⁴¹ 2d Amicus Br. at 6 (quoting *Riordan v. Kempiners*, 831 F.2d 690, 697-98 (7th Cir. 1987)).

⁴² 2d Amicus Br. at 6 ("quoting" *Carle v. McChord Credit Union*, 65 Wn. App. 93, 102, 827 P.2d 1070 (1992)).

⁴³ 2d Amicus Br. at 6 n.2.

⁴⁴ 2d Amicus Br. at 7 & n.3.

the sufficiency of the evidence behind the plaintiff's formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists."⁴⁵ To defeat summary judgment, a plaintiff's evidence must be both "specific"⁴⁶ and "substantial."⁴⁷ These standards apply in this case, as they do in all cases on summary judgment.

2. This Court Should Not Overrule Its Decisions In *Riehl, Hill, and Kastanis*

Next, WELA asks this Court to hold that trial courts are not required, on summary judgment, to analyze discrimination claims lacking direct evidence of discriminatory intent under the *McDonnell Douglas Corp. v. Green*,⁴⁸ burden-shifting analysis.⁴⁹ As an initial matter, this issue is not within the scope of the issues for which review was granted. Those issues pertain to the application of the pretext standard *within* the burden-shifting analysis, not an *attack upon* the burden-shifting analysis

⁴⁵ *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989) (quotation marks omitted and emphasis added).

⁴⁶ CR 56(e); *Young*, 112 Wn.2d at 225-26.

⁴⁷ *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 817-18, 733 P.2d 969 (1987) (holding that judgment as a matter of law is proper where there is not "substantial evidence" to support a plaintiff's claim); *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006) (holding that CR 50 and CR 56 standards are the same); *Nationwide Mutual Ins. Co. v. Hayles, Inc.*, 136 Wn. App. 531, 539, 150 P.3d 589 (2007) ("[S]ummary judgment is appropriate if there is no substantial evidence to sustain a verdict for [the nonmoving party]."); see also *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090, 1095 (9th Cir. 2005) (recognizing that probative value of direct evidence of discrimination is such that "very little" may suffice to defeat summary judgment, but holding that, otherwise, the ordinary requirement that a plaintiff present "specific and substantial" evidence to defeat summary judgment).

⁴⁸ 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

⁴⁹ 2d Amicus Br. at 8-10.

itself. Further, this issue was not raised below, as Ms. Scrivener agreed before the trial court that the burden-shifting analysis applies to her claims and expressly disavowed any intent to rely upon a direct evidence analysis.⁵⁰ WELA seeks to skirt these limitations by inaccurately describing the Court of Appeals' decision in this case as being predicated upon a distinction between "direct" and "circumstantial" evidence.⁵¹ In fact, the Court of Appeals' opinion in this case did not even use the words "direct" or "circumstantial," much less premise its holding upon a distinction between the two. In short, this issue is not properly before the Court and the Court should not reach it.

Should the Court reach this issue, its significance must be recognized. WELA acknowledges that to reach such a holding, this Court would need to overrule its prior decisions in *Hill v. BCTI*, and *Riehl v. Foodmaker, Inc.*⁵² Ms. Scrivener also candidly admits that such a holding

⁵⁰ CP at 92-93 (stating in summary judgment opposition that "Washington courts have adopted the burden-shifting framework established in *McDonnell Douglas Corp v. Green*," accepting the College's concession that she had satisfied the first step of the burden-shifting analysis, conceding that the College had satisfied the second step, and then proceeding to the third step); CP at 94 ("Plaintiff is not required to produce 'direct or 'smoking gun' evidence' of discriminatory animus.").

⁵¹ 2d Amicus Br. at 8 ("The Court [of] Appeals ruled that at summary judgment the 'substantial factor' standard does not apply in the absence of 'direct evidence.'"), 9 ("In this case, the Court of Appeals ruled that both the framework for deciding the case and the standard for liability turned on the characterization of the evidence as 'direct' or 'circumstantial.'").

⁵² 152 Wn.2d 138, 94 P.3d 930 (2004). Washington Employment Lawyers Association Amicus Curiae Memorandum at 7 ("This rule of law [articulated in *Hill* and *Riehl*] is outdated and should be reconsidered."); 2d Amicus Br. at 9-10.

would also overrule *Kastanis v. Educational Employees Credit Union*.⁵³

Although WELA asks the Court to overrule several of its prior decisions, it fails to identify the standard that applies in such circumstances. “When a party urges [this Court] to overrule an earlier decision, that party must make a *clear showing* that the established rule is *incorrect* and *harmful*.”⁵⁴ This Court has declined to overrule prior precedent when doing so was not “necessary.”⁵⁵

WELA has failed to argue, much less “clearly show,” that continued adherence to *Hill*, *Kastanis*, and *Riehl* is “harmful,” and that overruling these decisions is “necessary.” Nor could it—there are no circumstances where adhering to the *McDonald Douglas* burden-shifting analysis would result in a discrimination claim being dismissed on summary judgment that would otherwise have survived summary judgment. A plaintiff may satisfy both the prima facie and pretext stages of the burden-shifting analysis by providing evidence that raises a reasonable inference of discriminatory intent.⁵⁶ Thus, continued

⁵³ 122 Wn.2d 483, 859 P.2d 26 (1993). Supplemental Brief of Petitioner at 15-16.

⁵⁴ *In re Yates*, 177 Wn.2d 1, 25, 296 P.3d 872 (2013) (emphasis added and alteration and quotation marks omitted).

⁵⁵ *State v. Morales*, 173 Wn.2d 560, 582, 269 P.3d 263 (2012) (declining to overrule prior case when it was “not necessary”); *City of Seattle v. Dutton*, 147 Wash. 224, 232, 265 P. 729 (1928) (same); 21 C.J.S. Courts § 202 (“A court will not depart from an established rule, except in case of grave necessity[.]”).

⁵⁶ *Brownfield v. City of Yakima*, ___ Wn. App. ___, 316 P.3d 520, 533 (2014) (holding that a plaintiff may establish a prima facie case by pointing to “circumstances

adherence to *Hill*, *Kastanis*, and *Riehl* is not “harmful,” much less so “clearly” “harmful” that overruling these cases is “necessary.”

Nor has WELA “clearly shown” that these cases are “incorrect.” In arguing that required adherence to the burden-shifting analysis is incorrect, WELA primarily relies upon the United States Supreme Court’s decision in *Desert Palace, Inc. v. Costa*.⁵⁷ *Desert Palace* has nothing to do with the issues in this case. *Desert Palace* concerned the interpretation of a federal statute that permits a plaintiff to prevail on a discrimination claim when discrimination was only a “motivating” factor, rather than a “but for” factor, in an employment decision.⁵⁸ When discrimination is only a “motivating” factor, however, plaintiffs’ remedies are more limited than when discrimination is a “but for” factor.⁵⁹ *Desert Palace* held that a plaintiff did not need to provide direct evidence of discrimination in order to rely upon the lower “motivating” factor standard at trial.⁶⁰

As should be clear from this summary, *Desert Palace* has no relevance to this case. It addressed a statutory provision in Title VII, for which there is no analogue under Washington law, that offers different

that raise a reasonable inference of unlawful discrimination” (quotation marks omitted)); *Fell*, 128 Wn.2d at 643 n.32 (“A plaintiff establishes pretext by showing that the employer’s reasons for the allegedly discriminatory action are unworthy of credence or that the decision . . . was more likely than not motivated by discriminatory reasons.”).

⁵⁷ 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003). 2d Amicus Br. at 8-9.

⁵⁸ 539 U.S. at 93-95.

⁵⁹ *Id.*

⁶⁰ *Id.* at 101.

remedies to plaintiffs for different levels of causation. It concerned jury instructions and the ultimate burden a plaintiff faces in proving liability, not the appropriate analysis on summary judgment. It did not even reference the burden-shifting analysis that applies on summary judgment.

WELA also argues that the Ninth Circuit no longer draws the distinction between direct and circumstantial evidence when determining what analytical framework to apply to employment discrimination claims on summary judgment. Yet Ninth Circuit authority is inconsistent on this point.⁶¹ Further, the Ninth Circuit continues to distinguish between direct and circumstantial evidence in related contexts.⁶²

In short, Washington already has two approaches to summary judgment in employment cases—the direct evidence analysis and the burden-shifting analysis. In this case, Ms. Scrivener chose to proceed under the burden-shifting analysis.⁶³ WELA has not identified what creating a third approach—as of yet undeveloped other than WELA’s

⁶¹ See, e.g., *Delos Santos v. Potter*, 371 Fed. Appx. 746, 747 (9th Cir. 2010) (“We evaluate ADEA and Title VII claims based on circumstantial evidence through the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).”); *Glass v. Intel Corp.*, 345 Fed. Appx. 254, 255 (9th Cir. 2009) (“The district court also correctly applied the *McDonnell Douglas* test to his claims based on circumstantial evidence.”).

⁶² *McDaniels v. Mobil Oil Corp.*, 527 Fed. Appx. 615, 618 (9th Cir. 2013) (When a plaintiff relies upon circumstantial evidence, evidence of pretext must be “specific” and “substantial.”); *Becerril v. Pima County Assessor’s Office*, 587 F.3d 1162, 1163 (9th Cir. 2009) (same).

⁶³ CP at 92-94.

laundry list of its own preferred factors courts should consider⁶⁴—would do other than further complicate an already complex area of law. The Court should reject WELA’s invitation to do so.

3. The College Has Never Wavered In Its Explanation For Its Hiring Decision

Finally, WELA argues that the College has offered inconsistent explanations for the hiring decision at issue in this case.⁶⁵ This argument was raised neither before the trial court nor the Court of Appeals and may not be raised now. More importantly, however, WELA’s factual assertion is wrong. The College has consistently maintained the hiring decisions at issue in this case were based on teaching ability, not age. WELA’s argument conflates the explanation for Dr. Branch’s *statement* from his State of the College address with the explanation for the *hiring decision* at issue in this case. Thus, this argument also fails.

III. CONCLUSION

WELA has failed to present any basis for deviating from the common sense proposition that an employer’s stated desire to increase diversity is not evidence that an employer has utilized unlawful means to accomplish that goal. This Court should therefore affirm the dismissal of Ms. Scrivener’s age discrimination claim.

⁶⁴ 2d Amicus Br. at 15.

⁶⁵ 2d Amicus Br. at 20.

RESPECTFULLY SUBMITTED this 7th day of March, 2014.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "Chris Lane", written over a horizontal line.

CHRISTOPHER LANESE, WSBA # 38045
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

US Mail Postage Prepaid

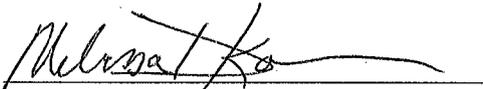
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 7th day of March, 2014, at Tumwater, Washington.



Melissa Kornmann, Legal Assistant

APPENDIX A

Not Reported in F.Supp.2d, 2013 WL 1222492 (N.D.Ga.)
(Cite as: 2013 WL 1222492 (N.D.Ga.))

H

Only the Westlaw citation is currently available.

United States District Court,
N.D. Georgia,
Atlanta Division.

Jack A. RAMSEY, Plaintiff,
v.

BOARD OF REGENTS OF the UNIVERSITY
SYSTEM OF GEORGIA, et al., Defendants.

Civil Action No. 1:11-CV-3862-JOF--JSA.
Jan. 30, 2013.

Jessica J. Wood, Robert Ernest Rigrish, Bodker
Ramsey Andrews Winograd & Wildstein, P.C.,
Atlanta, GA, for Plaintiff.

Annette Marie Cowart, Office of the Attorney
General, Katherine Powers Stoff, Romy Diane
Smith, State of Georgia Law Department, Atlanta,
GA, for Defendants.

***FINAL REPORT AND RECOMMENDATION
ON A MOTION FOR SUMMARY JUDGMENT***

JUSTIN S. ANAND, United States Magistrate Judge.

*1 Plaintiff Jack A. Ramsey initiated this action by filing a complaint in the Superior Court of Fulton County on April 29, 2011, and on October 7, 2011, he filed the "First Amended Complaint for Equitable Relief and Damages" [2] ("Amended Complaint"). On November 9, 2011, Defendants removed the action to this Court on the basis of federal question jurisdiction. Plaintiff's lawsuit arises out of the termination of his employment from the Georgia Institute of Technology. He has asserted two claims under federal law: he claims that Defendants retaliated against him for exercising his constitutional right to free speech, in violation of the First Amendment and 42 U.S.C. § 1983 (" § 1983 "), and discriminated against him on the basis of race, in violation of his constitutional right of equal

protection, 42 U.S.C. § 1981 (" § 1981 "), and § 1983. He also asserts a claim for retaliation under the Georgia Whistleblower Act, O.C.G.A. § 45-1-4 , a claim of negligence under the Georgia Tort Claims Act, O.C.G.A. § 50-21-24, and a claim of breach of implied covenant of good faith and fair dealing under Georgia law. In addition, he asserts nonsubstantive claims for punitive damages, prospective injunctive relief under § 1983, and attorney's fees under 42 U.S.C. § 1988 and O.C.G.A. §§ 13-6-11, 45-1-4(f).

The action is before the Court on the Defendants' Motion for Summary Judgment [29]. Defendants argue that they are entitled to summary judgment on all of the Plaintiff's claims asserted in the Amended Complaint. For the reasons discussed below, the undersigned **RECOMMENDS** that Defendants' Motion for Summary Judgment [29] be **GRANTED IN PART, DENIED IN PART**. In sum, the undersigned recommends that Defendants' Motion be **GRANTED** as to Plaintiff's federal claims. In addition, the undersigned recommends that the Motion be **GRANTED** as to his state law claims of negligence under the Georgia Tort Claims Act, and breach of implied covenant of good faith and fair dealing on the ground that Plaintiff has abandoned those claims by failing to respond to the arguments presented in Defendants' Motion for Summary Judgment. The undersigned recommends, however, that the Motion for Summary Judgment be **DENIED** as to Plaintiff's state law claim under the Georgia Whistleblower Act. Instead the undersigned recommends that the Court decline to exercise supplemental jurisdiction over the Plaintiff's claim under the Georgia Whistleblower Act, and that such claim be **REMANDED** to the Superior Court of Fulton County.

I. BACKGROUND

Unless otherwise indicated, the Court draws the undisputed facts primarily from Defendants' "Statement of Undisputed Material Facts as to which There is No Genuine Issue to Be Tried"

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[29–2] (“Def.SMF”) and Plaintiff’s “LR 56.1.B(2). b. Statement of Additional Facts” [37] (“PL SMF”).^{FN1} The Court also draws some facts from the Plaintiff’s “LR 56.1B.(2).a. Response to Movant’s Statement of Undisputed Facts” [36–1] (“Pl.Resp.SMF”), and Defendants’ “Response to Plaintiff’s LR 56.1B(2).b Statement of Additional Facts”) [39] (“Def.Resp.SMF”).^{FN2}

FN1. Although Plaintiff originally filed his response [36] to Defendants’ Motion for Summary Judgment on August 16, 2012, he did not file his Statement of Additional Facts [37] until six days later, on August 22, 2012, along with a “Corrected Index of Plaintiff’s Exhibits in Response to Defendants’ Motion for Summary Judgment.” Defendants have not objected to the Court’s consideration of Plaintiff’s Statement of Additional Facts on timeliness grounds, although they have objected to it on the ground that it does not comply with Local Rule 56.1B(1) because it does not state the alleged facts in separate concise numbered statements. *See* Defs. Resp. SMF [39] at 1 n. 1. The undersigned agrees with Defendants that Plaintiff’s Statement of Additional Facts does not comply with Local Rule 56.1B(1) because the facts are not presented in “concise” numbered statements. Plaintiff’s overly long and needlessly complicated allegations of facts, which are intertwined with legal conclusions and arguments, make it difficult to discern which material facts are actually in dispute. Nevertheless, the undersigned has considered the Plaintiff’s Statement of Additional Facts [37] and has attempted to discern which material facts are in genuine dispute.

FN2. The Court notes that neither party complied with Local Rule 56.1C, which requires as follows: “[W]hen a portion of a deposition is referenced and submitted,

then the party in custody of the original of that deposition shall cause the entire deposition to be filed with the Court.” LR 56.1C, NDGa. Although the parties failed to file the original deposition transcripts in their entirety along with the exhibits, it appears that they did file copies of the depositions as exhibits attached to their briefs, albeit in separate parts, and separated from the exhibits to the deposition.

*2 The Court has excluded all assertions of fact by either party that are immaterial or presented as arguments or legal conclusions, and has excluded assertions of fact unsupported by a citation to evidence in the record or asserted only in the party’s brief and not the statement of facts. *See* LR 56.1B, NDGa (“The court will not consider any fact: (a) not supported by a citation to evidence ... or (d) set out only in the brief and not in the movant’s [or respondent’s] statement of undisputed facts.”). The Court has also viewed all evidence and factual inferences in the light most favorable to Plaintiff, as required on a defendant’s motion for summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *McCabe v. Sharrett*, 12 F.3d 1558, 1560 (11th Cir.1994); *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 469 (11th Cir.1993). Accordingly, the following facts are viewed in the light most favorable to Plaintiff.

The Georgia Institute of Technology (“Georgia Tech”) is an institution of the University System of Georgia, administered by the Defendant Board of Regents of the University System of Georgia (“BOR”). Def. SMF at ¶ 4. Plaintiff Jack Ramsey began his employment with the Georgia Tech Facilities Operation Department as a Carpenter 1 in October of 1992 or 1993.^{FN3} Def. SMF at ¶ 1. He began working as a Senior Facilities Manager at the Georgia Tech College of Computing in 2000. Def. SMF at ¶ 1. Plaintiff did not have a written employment contract with Georgia Tech. Def. SMF

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at ¶ 2. Plaintiff alleges in the Amended Complaint that his race is “white/Caucasian,” and although neither party has pointed to evidence in the record as to Plaintiff’s race, it appears to be undisputed that Plaintiff is a white male. *See* Amend. Compl. [2] at ¶ 25; Pl. SMF at ¶ 62.

FN3. In Plaintiff’s Declaration filed with his response to the Defendants’ Motion for Summary Judgment, he contends he worked for Georgia Tech from October of 1993 to April 20, 2010. Ramsey Decl. [36–4] at ¶ 3.

Defendant Dr. George Paul Peterson became the President of Georgia Tech on April 1, 2009. Def. SMF at ¶ 5. Peterson’s duties as President of Georgia Tech included reviewing recommendations from the Impartial Board of Review regarding employee personnel actions. Def. SMF at ¶ 5.

Defendant Dr. James D. Foley is a professor in the School of Interactive Computing in the College of Computing at Georgia Tech. Def. SMF at ¶ 6. Foley served as the Interim Dean in the College of Computing from July 1, 2008, until June 30, 2010, during which time his duties included reviewing College of Computing employee termination appeals. Def. SMF at ¶ 6.

Defendant Marita J. Sullivan served as the Interim Associate Vice President of Human Resources at Georgia Tech from April 1, 2010 until December 31, 2010; prior to April 1, 2010, Sullivan was a Senior Director in the Human Resources Department. Def. SMF at ¶ 7.

Defendant Pearl J. Alexander is a Senior Director in the Human Resources Department at Georgia Tech. Def. SMF at ¶ 8.

Defendant Pamela S. Ruffin is the Director of Human Resources for the College of Computing at Georgia Tech. Def. SMF at ¶ 9.

*3 Georgia Tech maintains a policy regarding the use of procurement cards (“pcards”), Policy

5.2.1.8. Def. SMF at ¶ 14. That policy prohibits the use of a pcard for “split purchases” that divide one purchase into two or more to circumvent the transaction limits, and further provides that responsibility for pcard procurements rests with the cardholder. Def. SMF at ¶ 14. Plaintiff does not dispute that the pcard policy prohibits split purchases, but notes that the policy also provides that “minor violations” should be addressed as follows: a first offense involves addressing the violation with the cardholder and providing additional guidance as needed, while a second offense may involve the pcard being suspended for 30 days. Pl Resp. SMF at ¶ 14. Plaintiff also notes that the policy states that “Georgia Tech employees can confidentially and anonymously report suspected pcard misuse to the Department of Internal Auditing.” Pl. Resp. SMF at ¶ 14.

As part of his job duties, Plaintiff had a pcard assigned to him. Def. SMF at ¶ 15. On October 18, 2007, Plaintiff signed an acknowledgment form regarding the rules and procedures for using pcards. Def. SMF at ¶ 16. He also completed an online tutorial about pcards once a year. Def. SMF at ¶ 16.

Georgia Tech also maintains a policy on the disposal of property, Policy 7.9, which states in part as follows:

Non-Inventoried Supplies and Materials: All supplies, materials and equipment, regardless of value purchased through the Institute is the property of the state, federal government, or private grantor agency. As such, it cannot be sold, surplused, or transferred from Georgia Tech without the prior written approval of the appropriate federal sponsoring agency and/or the Institute Surplus Property Officer. Property that is considered valueless may be disposed of by cannibalization, recycling, or waste disposal provided a Certificate of Authorization for Destruction is obtained by the Institute’s Surplus Property Officer prior to disposal....

Def. SMF at ¶ 18.

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While employed at Georgia Tech, Plaintiff received training on the proper disposal of property. Def. SMF at ¶ 19. Plaintiff testified that while he received training, he did not have any additional training after he began working at the College of Computing. Pl. Resp. SMF at ¶ 19; Pl. Dep. at 43–44. On March 13, 2001, Plaintiff sent an email to faculty and staff in the College of Computing regarding scheduling a surplus equipment pickup and advising “I’ll get in touch with you on what the procedure is to surplus equipment.” Def. SMF at ¶ 21.

The BOR maintains a policy regarding the University System of Georgia ethics, Policy 8.2.20, which states in part:

8.2.20.5 Code of Conduct

We will:

I. Uphold the highest standards of intellectual honesty and integrity in the conduct of teaching, research, service and grants administration ...

III. Perform assigned duties and professional responsibilities in such a manner so as to further the USG mission ...

*4 VI. Comply with all applicable laws, rules, regulations and professional standards.

Def. SMF at ¶ 22. The policy also provides that “we will ... [r]eport wrongdoing to the proper authorities; refrain from retaliating against those who do report violations; and cooperate fully with authorized investigations.” Pl. Resp. SMF at ¶ 22.

As a result of a string of incidents regarding pcard abuse and malfeasance that were brought to light in 2008, Georgia Tech was involved in a large-scale audit involving pcard usage. Def. SMF at ¶ 45; Hurd Aff. at ¶ 3.^{FN4} As a result of that audit, the BOR issued new requirements for formal reporting of alleged employee malfeasance. Def. SMF at ¶ 45; Hurd Aff. at ¶ 3.

FN4. Although Plaintiff claims that this fact is “disputed,” he does not cite to any evidence disputing the Defendants’ contention that Georgia Tech had conducted an audit of pcard usage. See Pl. Resp. to SMF at ¶ 45. Instead, Plaintiff cites to evidence that supports Defendants’ contention that Georgia Tech had conducted an audit into pcard usage and that the BOR had issued new requirements for formal reporting of alleged employee malfeasance. See Pl. Resp. to SMF at ¶ 45; Pl. Dep., Ex. 26.

During part of the relevant time period when Plaintiff worked in the College of Computing, from approximately 2002 through 2006, Plaintiff’s supervisor was Larry Beckwith. Def. SMF at ¶ 10; Pl. Resp. SMF at ¶ 10; Pl. SMF at 11. Beckwith did not have a pcard, and would occasionally request that Plaintiff make purchases on his pcard at Beckwith’s direction. Pl. SMF at ¶ 2; Def. Resp. SMF at ¶ 2. According to Plaintiff, Beckwith “ordered” him to make purchases on his pcard that he could not verify were appropriate for Georgia Tech uses; Plaintiff claims that when he questioned this practice, Beckwith responded by saying “Let me get something straight. It’s my damn budget. It’s my damn PCard, and I’ll do whatever I see fit.” Pl. SMF at ¶ 2; Pl. Dep. at 81–82. Defendants dispute that Beckwith ever “ordered” Plaintiff to make purchases on his pcard. Def. Resp. SMF at ¶ 2; Hurd Dep. at 70–73.

Plaintiff contends that, on an unspecified date, he reported his concerns about Beckwith’s purchases made with the Plaintiff’s pcard to LerVerne Davis, the pcard coordinator, Carla Bennett, Director of Business Operations, and Ellen Zegura, the interim Dean. Pl. SMF at ¶ 3; Pl. Dep. at 40. He claims that he was informed by Davis that Beckwith’s actions were “within policy” and he should follow his supervisor’s directions. Pl. SMF at ¶ 3; Pl. Dep. at 86–89.

From approximately 2006 to 2009, Plaintiff no

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longer reported to Beckwith and reported to Russ Poole, but in 2009, Plaintiff was again placed under Beckwith's direct supervision. Pl. SMF at ¶¶ 2, 4, 5. On September 4, 2009, Beckwith presented Plaintiff with an invoice for electrical parts and told Plaintiff to pay for it on Plaintiff's pcard. Pl. SMF at ¶ 7. As he had before, Plaintiff brought this to the attention of Davis, the pcard coordinator, but Plaintiff asked Davis not to pursue the matter after he decided instead to talk to Georgia Tech's ombudsman. Pl. SMF at ¶¶ 7, 13.

In the fall of 2009, Plaintiff contacted John Schultz, the Georgia Tech ombudsman, to address some concerns Plaintiff had about Beckwith's request for Plaintiff to pay an invoice on Plaintiff's pcard that Plaintiff did not recognize, Beckwith's possible conflict of interest involving a Georgia Tech vendor, and Beckwith's transfer of Georgia Tech property to students. Def. SMF at ¶¶ 10–12; Pl. Resp. SMF at ¶¶ 10–12; Pl. Dep. at 52–58. Plaintiff testified during his deposition that he first met with Schultz on or about October 13, 2009, but he now contends that he first met with Schultz on September 29, 2009. Pl. SMF at ¶¶ 15, 16; Pl. Dep. at 58; Pl. Decl. at ¶ 16. In any event, it is undisputed that Plaintiff met a second time with Schultz, at which time he also met with Phil Hurd, Director of Internal Audits for Georgia Tech, and Randy Pearman from Internal Audits, and during that meeting, he turned over documents related to his suspicions about Beckwith. Def. SMF at ¶ 13; Pl. Resp. SMF at ¶ 13; Pl. SMF at ¶ 20. Prior to this meeting, Hurd had never met Plaintiff. Def. SMF at ¶ 24.

*5 Plaintiff claims that, during the meeting with Hurd, he told Hurd “you understand I'm going to lose my job over this.” Pl. SMF at ¶ 20; Pl. Dep. at 61; Pl. Decl. at ¶ 22. According to Plaintiff, Hurd responded: “Under no circumstances will you lose your job. You're protected by law....” Pl. SMF at ¶ 20; Pl. Dep. at 61; Pl. Decl. at ¶ 22.

In October of 2009, the Internal Audits (“IA”) Department began investigating Plaintiff's

allegations about Beckwith. Def. SMF at ¶ 23. Upon reviewing the IA department's investigation into the Plaintiff's allegations of pcard misuse by Beckwith, Hurd concluded that the records showed numerous pcard policy violations on Plaintiff's pcard, including split purchases. Def. SMF at ¶ 27; Hurd Dep. at 73–75. Hurd also concluded that, although Plaintiff claimed that Beckwith had forced Plaintiff to make those purchases on his pcard, there was no evidence to substantiate Plaintiff's claim that he had been forced. Def. SMF at ¶ 27; Hurd Dep. at 74–75, 116 (“the documentation supports the conclusion that there were numerous PCard violations over a series of years that were inappropriate and were willingly done by Mr. Ramsey”). Plaintiff disputes Hurd's conclusions from the investigation. Pl. Resp. SMF at ¶ 27.

As part of the IA investigation, the investigator reviewed emails that had been produced by Plaintiff showing communications among Plaintiff, Beckwith, and Georgia Tech students to whom Georgia Tech property had been transferred. Def. SMF at ¶ 29. Thomas Smyth sent an email to Beckwith on August 29, 2009 to request to take two desks that were Georgia Tech property. Def. SMF at ¶ 30. Beckwith then wrote an email to Plaintiff that stated: “Hi Jack—can we find a way to help Tom rescue these classic units that would otherwise land in the metal dumpster? Larry.” Def. SMF at ¶ 31; Pl. Dep., Ex. 10. Plaintiff responded in an email to Beckwith on August 31, 2009: “Just have him get in touch with me.” Def. SMF at ¶ 32; Pl. Dep., Ex. 10. Smyth then sent an email to Plaintiff and Beckwith on September 2, 2009, thanking them for the desks. Def. SMF at ¶ 33; Pl. Dep., Ex. 10.

Christopher Le Dantec sent an email to Plaintiff on September 4, 2009, requesting to take a desk and chair from Georgia Tech. Def. SMF at ¶ 34; Pl. Dep., Ex. 11. Plaintiff forwarded the email to Beckwith and Beckwith wrote an email to Plaintiff on September 8, 2009, which was also copied to Le Dantec:

Hi Chris—yes go ahead.

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Jack—can you arrange the same set up for dollys?

Larry.

Def. SMF at ¶ 36; Pl. Dep., Ex.11. Plaintiff then sent an email to Le Dantec on September 8, 2009, that stated: “Chris just give me a call when you ready [sic] the dollies.” Def. SMF at ¶ 37; Pl. Dep., Ex. 11. Le Dantec stated in an email to Plaintiff dated September 8, 2009, that the Georgia Tech property was going into his home. Def. SMF at ¶ 38.

Bence Kollanyi sent an email to Plaintiff on September 13, 2009, asking if there were any more desks that he could pick up. Def. SMF at ¶ 39. Plaintiff forwarded the email to Beckwith, and Beckwith responded in an email on September 14, 2009:

*6 Hi Bence—work out a time that you and Jack can meet to take a look at the remaining desks. You can have anything that's leftover.

Def. SMF at ¶ 40; Pl. Dep., Ex. 12. Kollanyi then sent an email on September 20, 2009, to Plaintiff and Beckwith in which he thanked them for the desks. Def. SMF at ¶ 41; Pl. Dep., Ex. 12.

After the investigation into the disposal of Georgia Tech property and a review of the emails among Smyth, Le Dantec, Kollanyi, Plaintiff, and Beckwith, Hurd, the IA Director, came to the conclusion that both Plaintiff and Beckwith participated in the improper transfer of Georgia Tech property to private individuals.^{FN5} Def. SMF at ¶ 43; Hurd Aff. at ¶ 12. Plaintiff does not dispute the contents of the emails about assisting the students with taking the Georgia Tech property, but he contends that he was following his supervisor's direction and did not know whether Beckwith had followed the surplus property disposal procedure. Pl. SMF at ¶¶ 10–12; Pl. Dec. at ¶ 12.

FN5. Although Plaintiff claims that this fact is “disputed,” Plaintiff has not cited to

any evidence in the record to dispute the allegation. *See* Pl. Resp. to SMF at ¶ 43. Plaintiff states only that Defendants have submitted an “[i]naccurate description of the cited deposition testimony and affidavit,” but he fails to explain what is inaccurate about the Defendants' contention. *See id.* Defendants have cited to Hurd's affidavit in support of their allegation, and the undersigned finds that the cited evidence supports the allegation. *See* Def. SMF at ¶ 43; Hurd Aff. at ¶ 12.

On October 28, 2009, Hurd sent a Letter of Malfeasance to John Fuchko, to whom Hurd reported directly at the BOR, regarding suspected malfeasance by employees in the College of Computing. Def. SMF at ¶ 25; Pl. SMF at ¶ 22. According to Hurd, the word “malfeasance” referred to criminal wrongdoing; although he did not find malfeasance in Plaintiff's pcard usage, he did find policy violations. Def. SMF at ¶ 28; Pl. SMF at ¶ 9; Hurd Dep. at 73–74. Although Plaintiff admits that Hurd sent the Letter of Malfeasance to Fuchko, he disputes that “malfeasance” actually occurred. Pl. Resp. SMF at ¶ 25.

Between October of 2009 and April of 2010, no action was taken to discipline either Beckwith or Plaintiff. Pl. SMF at ¶ 25. Chuck Donbaugh, the Associate Vice President of Human Resources at that time, was “concerned that we may not have grounds for termination.” Pl. SMF at ¶ 25; Pl. Decl. at ¶ 23; Sullivan Dep. at 27–28. On April 1, 2010, Defendant Sullivan became the Interim Associate Vice President of Human Resources at Georgia Tech. Def. SMF at ¶ 7. In early April, at the conclusion of a meeting, Hurd said to Sullivan, “I was very, very surprised to find out that Mr. Beckwith and Mr. Ramsey are still employed at Georgia Tech. I thought that had been handled.”^{FN6} Pl. SMF at ¶ 28; Sullivan Dep. at 25. According to Sullivan, she told Hurd she would check into the matter; when she consulted with Donbaugh, he told her that he did not remember the

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details, and he suggested that she look into the matter herself and make a recommendation. Def. Resp. SMF at ¶ 25; Sullivan Dep. at 25, 27–28.

FN6. Defendants object to this statement by Hurd to Sullivan as inadmissible hearsay. Def. Resp. to SMF at ¶ 28. The Court overrules that objection on the ground that the statement is not submitted for the truth of the matter. *See* Fed.R.Evid. 801(c) (2). Hurd's statement is not submitted for the truth of its contents, *i.e.*, to prove that Hurd was surprised that Plaintiff and Beckwith were still employed by Georgia Tech, because his surprise or lack thereof is not material to any issue in this case. Instead, Hurd's alleged statement to Sullivan is only relevant to the extent it offers an explanation for why Sullivan acted on this matter after six months had passed with no disciplinary action against Plaintiff or Beckwith. Donbaugh's alleged statement to Sullivan that she should look into the matter herself is also not hearsay for the same reason. Furthermore, Defendants have also cited to Donbaugh's statement to Sullivan that she take a "fresh look at the information because he did not remember the details by the time he left his position in April 2010." Def. Resp. SMF at ¶ 25. Defendants cannot cite to Donbaugh's statement to Sullivan for their own purposes, and then object to it as inadmissible hearsay when Plaintiff cites to the same alleged statement. The Court concludes that it is not hearsay in any event, because it is material only to explain Sullivan's own actions afterwards.

On April 9, 2010, Hurd and Kirby Cuenca, an investigator on the case, met with Sullivan and Defendant Pearl Alexander, who was a Senior Director in Human Resources, to explain the results of the investigation involving Plaintiff and Beckwith. Def. SMF at ¶ 47; Hurd Dep. at 90–92;

Alexander Dep. at 69–71, 79–80. Plaintiff does not dispute that Hurd and Cuenca met with Sullivan and Alexander on April 9, 2010, but he contends that Hurd revealed only limited information from the IA investigation that supported Hurd's conclusions regarding Plaintiff's alleged violations. Pl. SMF at ¶¶ 29–31; Sullivan Dep. at 55; Alexander Dep. at 71–72.

*7 After reviewing the evidence from the IA Department investigation, Sullivan and Alexander also reviewed whether Plaintiff had taken training on ethics and the proper use of pcards. Def. SMF at ¶ 48. Sullivan also asked Alexander to verify Plaintiff's race and other demographic information because Sullivan wanted to keep track of employee demographic data when adverse actions were taken during her leadership to monitor whether any demographic group was adversely impacted by those actions. Def. SMF at ¶ 48.

Defendants contend that Sullivan and Alexander recommended that Plaintiff's employment be terminated after they had confirmed that Plaintiff had taken ethics training and pcard training. Def. SMF at ¶ 49; Sullivan Dep. at 60–61; Sullivan Aff. at ¶ 6; Alexander Dep. at 81–84; Alexander Aff. at ¶¶ 4–5. According to Defendants, Sullivan and Alexander met with the Director of Human Resources for the College of Computing, Defendant Ruffin, on April 16, 2010, and showed her an IA memorandum dated October 23, 2009. Def. SMF at ¶ 50; Ruffin Dep. at 24–28; Pl. Dep., Ex. 7. That October 23, 2009 memorandum stated that it was sent from Hurd to Fuchko, but the memorandum was actually an earlier draft of the Letter of Malfeasance that Hurd sent to Fuchko on October 28, 2009. Def. SMF at ¶ 25 n. 3; Pl. SMF at ¶ 22; Hurd Aff. at 16; Pl. Dep., Ex. 7. The October 23, 2009 IA memorandum stated in part as follows:

Georgia Tech Internal Auditing is currently investigating allegations of malfeasance within the College of Computing (CoC). On October 13th, at the request of John Schultz our

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Ombudsman, I met with an employee, Jack Ramsey, of the CoC to hear allegations of alleged financial improprieties. The employee stated that his supervisor, Larry Beckwith, had been instructing him to make payments on PCard purchases that were inappropriate or, at best, unsupported with proper documentation. In addition, Mr. Ramsey stated that Mr. Beckwith had given away Institute assets to outside parties without using appropriate channels for surplus equipment. Finally, Mr. Ramsey stated that Mr. Beckwith had performed paid work for companies that were vendors to the Institute. These were vendors which Mr. Beckwith had authority to select for the provision of goods and services.

Def. SMF at ¶ 51; Pl. Dep., Ex. 7.

Based upon the information provided by IA, Sullivan and Alexander recommended that Plaintiff's employment be terminated and Ruffin supported that decision. Def. SMF at ¶ 50; Ruffin Dep. at 34. Ruffin then took the October 23, 2009 memorandum to Defendant Foley, who was at that time the Interim Dean in the College of Computing. Def. SMF at ¶¶ 6, 50; Ruffin Dep. at 24-28. Although Defendants contend that Foley informed Ruffin that he was in agreement with the recommendation to terminate Plaintiff's employment, the testimony Defendants cite from Ruffin's deposition does not support that allegation. See Def. SMF at ¶ 52; Ruffin Dep. at 27-28 (stating that she informed Foley that Human Resources recommended termination, and Foley then called Hurd to ask him questions).

*8 Alexander testified during her deposition that, had the Plaintiff not revealed all of the information related to the pcard purchases and the disposal of the Georgia Tech property to students, she would "most likely not" have been in a position to recommend the termination of Plaintiff's employment. Pl. SMF at ¶ 26; Alexander Dep. at 117-118.

On April 20, 2010, Ruffin and Mike Luttrell, who was Plaintiff's direct supervisor at that time, met with Plaintiff and delivered to him a termination letter dated that same day and signed by Luttrell. Def. SMF at ¶ 55; Pl. Dep., Ex. 8. That April 20, 2010 termination letter ("Termination Letter") stated as follows:

In light of the audit executed in October 2009 by the Georgia Tech Internal Auditing department, it has been determined that there has been malfeasance on your part regarding the theft of Georgia Tech property and the misuse of a Procurement card. It has been concluded that you are in violation of Institute and Board of Regents Ethics Policies and the procedures for proper disposal of Institute property. These actions have further resulted in irreparable trust in your ability to execute administration of the facilities for the College of Computing.

Therefore, we are terminating your employment effective immediately-April 20, 2010. You have the right to appeal this decision within the next five (5) business days to the Interim Dean, College of Computing, Dr. James Foley. If he upholds my decision, you have the further right to appeal, according to OHR Policy 7.3 Appeals Procedure, to the Impartial Board of Review. Please contact Ms. Kim Krajovic at (404) 894-7535 for assistance in this process within five (5) business days of Dr. Foley's notification to you.

April 20, 2010 Termination Letter, Pl. Dep., Ex. 8.

Georgia Tech also terminated the employment of Beckwith, Plaintiff's former supervisor, on April 20, 2010, the same day it terminated Plaintiff's employment. Def. SMF at ¶ 85.

Although Plaintiff does not dispute that Ruffin and Luttrell met with him on April 20, 2010, to deliver the Termination Letter to him at that time, he disputes Defendants' contention that Sullivan

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and Alexander merely “recommended” the termination of his employment. Pl. Resp. SMF at ¶¶ 49, 50. Plaintiff contends that it was Sullivan and Alexander who actually made the decision to terminate his employment, along with perhaps Hurd. Pl. Resp. SMF at ¶ 49; Pl. SMF at ¶ 33; Pl. Dep., Ex. 46; *see also* Ruffin Dep. at 34 (stating “I supported their decision”). According to Plaintiff, Ruffin and Luttrell could not even explain the basis for the Termination Letter when they gave it to him on April 20, 2010, which Defendants dispute. Pl. SMF at ¶ 34; Pl. Decl. at ¶ 24; Def. Resp. SMF at ¶ 34.

The parties also dispute whether Foley actually supported the decision to terminate Plaintiff's employment, and whether he believed that the termination was warranted. *See* Pl. SMF at ¶ 33. According to Defendants, after Plaintiff received the Termination Letter, he met with Foley on April 22, 2010, to appeal his termination, and Foley upheld the termination at that time because he believed it was based on proper grounds. Def. SMF at ¶ 55; Pl. Dep. at 105; Foley Aff. at ¶ 4. Foley states in his Affidavit as follows:

*9 Regarding the termination of Jack Ramsey, I upheld the termination based upon what I was told by the Office of Human Resources about the Internal Auditing investigation. At the time, I believed the termination was based on proper grounds. If I had felt very strongly that termination was not the right thing to do, then I would have raised a red flag and said something.

Foley Aff. at ¶ 4. Plaintiff, however, cites to Foley's deposition testimony in which he testified that he sent an e-mail on April 23, 2010, stating that the decision to terminate Plaintiff and Beckwith did not come from him or Luttrell or anyone in the College of Computing. Pl. Resp. SMF at ¶ 55; Pl. SMF at ¶ 35; Foley Dep. at 17–18.

It is undisputed that Plaintiff met with Foley on April 22, 2010, and asked if there was an investigation or report that further explained why

he had been terminated; after that meeting, Ruffin gave Plaintiff the October 23, 2009 IA memorandum. Def. SMF at ¶¶ 56–57. On April 23, 2010, Plaintiff received a letter from Foley that was dated April 22, 2010, that stated in relevant part as follows:

Pursuant to the appeals meeting that was held Thursday, April 22, 2010 my decision is to uphold your termination that was effective April 20, 2010.

Def. SMF at ¶ 59; Pl. Dep., Ex. 9.

After he received the letter from Foley, Plaintiff met with the Georgia Tech ombudsman Schultz, who described the appeals process and encouraged Plaintiff to appeal his termination. Pl. SMF at ¶ 43. Plaintiff appealed his termination to the Georgia Tech Impartial Board of Review (“IBR”). Def. SMF at ¶ 60. The IBR members were Shannon Sullivan, Graduate Program Coordinator in Biomedical Engineering; Kathryn Friedman, Information Analyst I in the College of Sciences; Patricia Glore, Program Coordinator in Polymer, Textile & Fiber Engineering; and Adrienne Miller, Program Coordinator in the College of Management. Def. SMF at ¶ 60. At the IBR hearing held on June 2, 2010, Plaintiff testified, had an opportunity to present his own witnesses, and had an opportunity to ask questions of the Georgia Tech witnesses. Def. SMF at ¶ 61; Pl. SMF at ¶ 46.

On June 8, 2010, the IBR issued a report (the “IBR Report”) to Defendant Peterson, the President of Georgia Tech, in which the IBR unanimously recommended that the decision to terminate Plaintiff's employment be overturned and that Plaintiff's request for reinstatement be granted. Def. SMF at ¶¶ 5, 62; Pl. Resp. SMF at ¶ 62; Pl. SMF at ¶ 47; Pl. Dep., Ex. 13; Pl. Ex. C.16. That IBR Report stated in part as follows:

The Board unanimously recommends that Management's decision to terminate Mr. Ramsey be overturned and that he be reinstated. Based on

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the materials provided during the hearing, the Board found that the Grievant [Plaintiff] did execute various wrongdoing Pcard transactions but that under the circumstances termination was inappropriate. The Board found that the Grievant did make an effort to avoid violating the Institute's Pcard policy by speaking with Poole and Bennett. Furthermore, the Board found no evidence that Mr. Ramsey's actions, if improper, constituted a willful violation of the Georgia Tech Pcard policy. Under the Procurement Cards policy 5.2.1.8, the Board found that Grievant's misconduct represented a minor rules violation. Furthermore, the Board was unable to resolve that Grievant engaged in malfeasance regarding the removal of Georgia Tech property. Rather, based on the emails presented the Board found that the Grievant appeared to be complying with his supervisor's instructions as to the property removal.

*10 Thus, the Board unanimously recommends that Management's termination decision be overturned and Grievant's request for reinstatement be granted.

IBR Report, Pl. Dep., Ex. 13; Def. SMF at ¶ 63; Pl. Resp. SMF at ¶ 63; Pl. SMF at ¶ 47.

After the IBR issued its recommendation in the IBR Report that the Plaintiff be reinstated, Hurd met with President Peterson on June 25, 2010, for approximately thirty minutes to discuss Plaintiff's appeal, along with Beckwith's appeal of his termination. Pl. SMF at ¶ 48. On July 1, 2010, Georgia Tech officials, including Sullivan and Alexander, met to discuss a conditional reinstatement for Plaintiff. Pl. SMF at ¶ 50. The next day, July 2, 2010, President Peterson sent Plaintiff a letter in which he offered Plaintiff reinstatement under certain conditions (the "Offer Letter"). Def. SMF at ¶ 64; Pl. Resp. SMF at ¶ 64; Pl. Dep., Ex. 14. That Offer Letter stated as follows:

I have completed my review of the report

submitted by the Impartial Board of Review along with the supporting documentation. I view your misconduct as very serious based upon the evidence presented and the additional background information available. However, I am not convinced that termination is the best course of action at this time. As a result, I propose the following:

- 1) Your suspension without pay from April 20, 2010 through July 18, 2010 will remain in place;
- 2) You will return to work, but in a position to be identified at the earliest possible date;
- 3) Your return will be in a probationary status for a period of one year;
- 4) You will be compensated at your current salary during the probationary period.
- 5) If, at the end of the one year probationary period we have not been able to identify a satisfactory position at your current job grade, your salary will be subject to adjustment to the grade salary range associated with your position at that time.

Acceptance of this reinstatement will also require that you execute a release in favor of Georgia Tech promising, among other things, not to sue Georgia Tech or any of its employees for claims arising from your suspension and reinstatement.

Please let me know if the terms of this offer are acceptable by no later than July 9, 2010. In the event I do not hear from you, I will identify an alternative course of action.

Pl. Dep., Ex. 14.

Defendants contend that, when Peterson sent Plaintiff the Offer Letter, Peterson believed that he was accepting the IBR's recommendation of reinstatement, but that it was inappropriate to return Plaintiff to a position with the same level of responsibility given his violation of Georgia Tech

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policies. Def. SMF at ¶ 64; Peterson Dep. at 75, 84–85, 111. The Offer Letter did not enclose the IBR Report, however, nor explain to Plaintiff that the IBR had recommended that the Plaintiff's termination decision be overturned and that he be reinstated.^{FN7} Pl. SMF at ¶ 51; Pl. Dep., Ex. 14.

FN7. Plaintiff admits that he eventually received the IBR Report on July 7, 2010, in response to an Official Records Act request. Pl. SMF at ¶ 52; Pl. Decl. at ¶ 52.

*11 On July 9, 2010, Plaintiff responded by letter to Peterson rejecting Peterson's offer and requesting full reinstatement with back pay and benefits retroactive to April 20, 2010. Def. SMF at ¶ 66; Pl. Dep., Ex. 15. On July 20, 2010, Peterson responded by letter to Plaintiff stating that Georgia Tech could not provide full reinstatement and that Plaintiff's employment remained terminated effective April 20, 2010. Def. SMF at ¶ 67; Pl. Dep., Ex. 16.

After receiving Peterson's July 20, 2010 letter, Plaintiff appealed to the BOR. Def. SMF at ¶ 69. On September 28, 2010, he made a submission to the BOR that provided a detailed identification of the matters presented at the June 2, 2010 IBR hearing. Pl. SMF at ¶ 65; Pl. Ex. E. On October 14, 2010, J. Burns Newsome, Vice Chancellor for Legal Affairs at the BOR, wrote a letter to Plaintiff's counsel stating that Plaintiff's application for review was presented at the BOR's meeting on October 12 and 13, 2010, but the BOR had decided to continue the appeal for further review. Def. SMF at ¶ 71; Pl. SMF at ¶ 68; Pl. Dep., Ex. 17. On November 12, 2010, Newsome sent a letter to Plaintiff's counsel notifying him that Plaintiff's application for review was presented at the BOR meeting on November 9 and 10, 2010. Def. SMF at 173; Pl. Dep., Ex. 18. The letter informed Plaintiff's counsel that the BOR decided to uphold Georgia Tech's termination decision. Def. SMF at ¶ 73; Pl. Dep., Ex. 18.

According to Plaintiff, Beckwith also asked

Daron Foreman, an African American employee of Georgia Tech, to violate Georgia Tech policies relating to Foreman's pcard. Pl. SMF at ¶ 4; Def. SMF at ¶ 78; Pl. Dep. at 172–175. Plaintiff contends that, after he complained about Beckwith's usage of his pcard, Beckwith “shifted his PCard directions” to Foreman, who was a facilities manager in the Klaus building, use his pcard. Pl. SMF at ¶ 4. Defendants contend that the IA department investigated Foreman's pcard usage as part of the audit of Beckwith and Plaintiff. Def. SMF at ¶ 79; Hurd Dep. at 71; Hurd Aff. at ¶ 10. The IA department found that Foreman had not engaged in malfeasance or policy violations on his pcard. Def. SMF at ¶¶ 79–80; Hurd Dep. at 71; Hurd Aff. at ¶ 10. Plaintiff argues that IA did not conduct a sufficient investigation to reach this conclusion, but does not point to specific facts from which the Court could make that conclusion. *See* Pl. Resp. SMF at ¶¶ 79–80.

Plaintiff also contends that Preethi Reddy-Veluri, an Indian Georgia Tech employee who is an Accountant in the College of Computing, was not terminated from her employment for allegations of similar misconduct to that of Plaintiff. Def. SMF at ¶ 81; Pl. Dep. at 173–174. Reddy-Veluri received a written warning for giving out a FEDEX account number to another employee in violation of Georgia Tech policy and also received a verbal reprimand for using her pcard to pay for her home Comcast cable bill, which included internet service she used to work from home. Def. SMF at ¶ 84; Ruffin Aff. at ¶ 8. Reddy-Veluri's practice had been to reimburse Georgia Tech for the portion of the bill associated with her cable service and she had been permitted to use her pcard for this purpose when she worked in the College of Architecture. Def. SMF at ¶ 84; Ruffin Aff. at ¶ 84.

*12 Plaintiff contends that Amanda Scachitti^{FN8} was also a Georgia Tech employee who was “implicated” by the IA department, but her employment was reinstated on appeal. Pl. SMF at ¶

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38; Hurd Dep. at 176–78. According to Plaintiff, it was determined that Scachitti had “no direct involvement in the claimed malfeasance,” but she was using a Georgia Tech computer for personal benefit. Pl. SMF at ¶ 38; Hurd Dep. at 176–78. Defendants do not dispute that Scachitti was reinstated, but contend that, after an investigation into a group of employees who embezzled property, it was determined that Scachitti was not culpable in the embezzlement or conspiracy. Def. Resp. SMF at ¶ 38; Hurd Aff. at ¶ 14. Scachitti was not accused, nor was she found guilty, of committing any pcard violations or giving away Georgia Tech property. Def. Resp. SMF at ¶ 38; Hurd Aff. at ¶ 14.

FN8. Defendants refer to her as Amanda Sciachitti. Def. Resp. SMF at ¶ 38.

Plaintiff contends that, after Georgia Tech fired him and Beckwith, who are both white males, it replaced them with African Americans. Pl. SMF at ¶ 62; Luttrell Dep. at 104–11; Ruffin Dep. at 79–84. Defendants admit that Plaintiff's position was filled by Anthony McCoy, an African American who was promoted internally. Def. Resp. SMF at ¶ 62. Defendants contend, however, that Beckwith was not replaced because his duties were redistributed. Def. SMF at ¶ 62; Luttrell Dep. at 104–107; Ruffin Dep. at 79–81.

After Georgia Tech terminated the Plaintiff's employment, Plaintiff requested a hearing before the Georgia Department of Labor (“DOL”), and a hearing was held on August 20, 2010. Pl. SMF at ¶ 63. A DOL hearing officer ultimately concluded that the BOR “failed to properly substantiate the claim of malfeasance” and “did not show that [Plaintiff] was at fault by ... deliberate, willing and knowing action on his part.” Pl. SMF at ¶ 63; Def. Ex. 46.

II. DISCUSSION

A. SUMMARY JUDGMENT STANDARD

Summary judgment under Rule 56 is

authorized when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a). The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 175, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Bingham, Ltd. v. United States*, 724 F.2d 921, 924 (11th Cir.1984). The movant carries this burden by showing the court that there is “an absence of evidence to support the nonmoving party's case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In making its determination, the court must view the evidence and all factual inferences in the light most favorable to the nonmoving party.

Once the moving party has adequately supported its motion, the nonmoving party must come forward with specific facts that demonstrate the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The nonmoving party is required “to go beyond the pleadings” and to present competent evidence designating “specific facts showing that there is a genuine issue for trial.” *Celotex*, 477 U.S. at 324. Generally, “[t]he mere existence of a scintilla of evidence” supporting the nonmoving party's case is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

*13 When considering motions for summary judgment, the court does not make decisions as to the merits of disputed factual issues. *See Anderson*, 477 U.S. at 249; *Ryder Int'l Corp. v. First American Nat'l Bank*, 943 F.2d 1521, 1523 (11th Cir.1991). Rather, the court only determines whether there are genuine issues of material fact to be tried. Applicable substantive law identifies those facts that are material and those that are irrelevant. *Anderson*, 477 U.S. at 248. Disputed facts that do

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not resolve or affect the outcome of a suit will not properly preclude the entry of summary judgment. *Id.*

If a fact is found to be material, the court must also consider the genuineness of the alleged factual dispute. *Id.* An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is “merely colorable” or is “not significantly probative.” *Id.* at 250. A dispute is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 242. Moreover, for factual issues to be genuine, they must have a real basis in the record. *Matsushita*, 475 U.S. at 587. The nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Id.* at 586. “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’ ” *Id.* at 587 (quoting *First Nat’l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968)). Thus, the standard for summary judgment mirrors that for a directed verdict: “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 259.

B. PLAINTIFF'S CLAIMS

Plaintiff has asserted five substantive claims against the Defendants, two claims that arise under federal law and three claims brought under Georgia law. The Court will first address Plaintiff's two federal claims, which are both brought under § 1983, and will then address the claims brought under Georgia law.

1. Plaintiff's Federal Claims under § 1983

In Count III of the Amended Complaint, Plaintiff asserts a claim under 42 U.S.C. § 1983 (“§ 1983”) for a violation of his First Amendment rights. *See* Amend. Compl. [2] at ¶¶ 35–42. In Count IV of the Amended Complaint, Plaintiff asserts a claim under § 1983 and 42 U.S.C. § 1981

(“§ 1981”) for race discrimination and a denial of his equal protection rights.

a. Legal Standards for Claims under 42 U.S.C. § 1983

The statute provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

*14 42 U.S.C. § 1983.

In order to prevail on a claim under § 1983, a plaintiff must establish that: (1) a person deprived him of a right secured under the Constitution or a federal law, and (2) the deprivation occurred under color of state law. *Arrington v. Cobb County*, 139 F.3d 865, 872 (11th Cir.1998) (*citing Willis v. Univ. Health Servs.*, 993 F.2d 837, 840 (11th Cir.1993)); *Edwards v. Wallace Cmty. College*, 49 F.3d 1517, 1522 (11th Cir.1995). The parties do not dispute that the Defendants were state actors and were acting under color of state law for the purposes of Plaintiff's § 1983 claims. *See West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (defining “acting under color of law” as acting with power possessed by virtue of the defendant's employment with the state).

b. First Amendment

In Count III of the Amended Complaint, Plaintiff asserts a claim under § 1983 for a violation of his First Amendment rights. *See* Amend. Compl. [2] at ¶¶ 35–42. Plaintiff alleges that Defendants, while acting under color of state law, retaliated against him for speaking out on a matter of public concern by terminating his employment.

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The First Amendment provides that Congress shall make no law abridging the freedom of speech. U.S. Const. amend. I. This right was made applicable to the states by the Fourteenth Amendment. *Everson v. Board of Educ.*, 330 U.S. 1, 8, 67 S.Ct. 504, 91 L.Ed. 711 (1947). A state, or a person acting under color of state law, may not demote or terminate the employment of a public employee in retaliation for speech protected by the First Amendment. *Rankin v. McPherson*, 483 U.S. 378, 383, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); *Morgan v. Ford*, 6 F.3d 750, 753–754 (11th Cir.1993); *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir.1989).

It is well established, however, that government regulation of a public employee's speech is different from government regulation of the speech of its citizens. *Boyce v. Andrew*, 510 F.3d 1333, 1342 (11th Cir.2007). The Supreme Court has stated that, when an individual becomes a government employee, the citizen “must accept certain limitations on his or her freedom.” *Garcetti v. Ceballos*, 547 U.S. 410, 419, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). Thus, when the government is acting as an employer, it is afforded broad discretion in its employment decisions. *Boyce*, 510 F.3d at 1341. Like private employers, government employers “need a significant degree of control over their employee's words and actions; without it, there would be little chance for the efficient provision of public services.” *Garcetti*, 547 U.S. at 418.

The Eleventh Circuit has developed a four-part test to determine whether a government employee has suffered unlawful retaliation for exercising the right to free speech. See *Anderson v. Burke County*, 239 F.3d 1216, 1219–20 (11th Cir.2001). The first two steps involve questions of law that must be determined by the Court, and the factual questions that make up the third and fourth steps must be considered only after the Court determines that the first two steps are satisfied. See *Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1157 n. 23 (11th

Cir.2002); *Collier v. Clayton County Comm. Serv. Bd.*, 236 F.Supp.2d 1345, 1364–65 (N.D.Ga.2002) (Carnes, J.).

*15 First, a court must determine “whether the employee's speech may be ‘fairly characterized as constituting speech on a matter of public concern.’” *Bryson*, 888 F.2d at 1565 (quoting *Rankin*, 483 U.S. at 384 (citation omitted)); see also *Morgan*, 6 F.3d at 754; *Kurtz v. Vickrey*, 855 F.2d 723 (11th Cir.1988); *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir.1986). Second, if the speech is a matter of public concern, the court must then weigh “the employee's first amendment interests against ‘the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.’” *Bryson*, 888 F.2d at 1565 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)); see also *Morgan*, 6 F.3d at 754. This balancing test has become known as the *Pickering* test, derived from the Supreme Court's decision in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). See *Brochu*, 304 F.3d at 1157; *Anderson*, 239 F.3d at 1220; *Collier*, 236 F.Supp.2d at 1365.

Once the court determines that the employee's speech was on a matter of public concern and the employee's right to free speech outweighs the competing interests of the state, it must then examine whether the plaintiff has established that the speech played a “substantial part” in the employer's decision to discharge the employee. *Bryson*, 888 F.3d at 1565 (citing *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)); see also *Morgan*, 6 F.3d at 754. Finally, if the court determines that the plaintiff has presented sufficient evidence to establish that the speech was a substantial motivating factor in the subsequent employment decision, “the state must prove by a preponderance of the evidence that ‘it would have reached the same decision ... even in the absence of the protected conduct.’” *Bryson*, 888 F.3d at 1566 (

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quoting *Mt. Healthy*, 429 U.S. at 286); see also *Morgan*, 6 F.3d at 754.

(1) Plaintiff Spoke as an Employee not a Citizen

Defendants argue that Plaintiff has failed to present sufficient evidence to establish that he spoke out as a citizen on a matter of public concern because the undisputed evidence in the record demonstrates that Plaintiff was speaking primarily as a government employee at the time he expressed his concerns about Beckwith.

To be a matter of public concern, an employee's speech must relate to a "matter of political, social, or other concern to the community." *Connick v. Meyers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); see also *Morgan*, 6 F.3d at 754. Absent extraordinary circumstances, however, a public employee's speech is not entitled to First Amendment protection when the employee speaks not as a citizen upon matters of public concern, but instead speaks as an employee upon matters relating to his job duties or a personal concern. See *Morgan*, 6 F.3d at 754; *Connick*, 461 U.S. at 147. "A court must therefore discern the purpose of the employee's speech—that is, whether she spoke on behalf of the public as a citizen, or whether the employee spoke for herself as an employee." *Morgan*, 6 F.3d at 754 (quoting *Connick*, 461 U.S. at 146); see also *Kurtz*, 855 F.2d at 730; *Ferrara*, 781 F.2d at 1515–16.

*16 The Supreme Court has clarified the standard on determining whether an employee spoke out on a matter of public concern by holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421; see also *Boyce*, 510 F.3d at 1342–43. After the Supreme Court's decision in *Garcetti*, the Eleventh Circuit modified the first step of the four-part analysis of First Amendment retaliation claims. *D'Angelo v. School Bd. of Polk*

County, Fla., 497 F.3d 1203, 1209 (11th Cir.2007); see *Boyce*, 510 F.3d at 1342. The Eleventh Circuit has instructed that a court must determine at the outset: "(1) if the government employee spoke as an employee or citizen and (2) if the speech addressed an issue relating to the mission of the government employer or a matter of public concern." *Boyce*, 510 F.3d at 1342 (emphasis added) (citing *D'Angelo*, 497 F.3d at 1209). If the government employee was speaking pursuant to his official duties, he was speaking as an employee and not a citizen. *Id.*

When a court considers whether a government employee's speech related primarily to his job or whether it was speech relating to an issue of public concern, the result "must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147–48. Merely because the subject matter may be of general interest to the public, however, does not make the employee's speech a matter of "public concern" for First Amendment purposes. *Morris v. Crow*, 142 F.3d 1379, 1381 (11th Cir.1998) (*per curiam*). "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case." *Connick*, 461 U.S. at 149; see also *Boyce*, 510 F.3d at 1344.

In this case, after considering the "content, form, and context" of the Plaintiff's complaints about Beckwith's activities, the Court concludes that Plaintiff's speech is not constitutionally protected because the evidence indicates that he spoke as a government employee and not as a citizen speaking out on a matter of public concern. Plaintiff admits that Georgia Tech had a policy requiring him and other employees to "[r]eport wrongdoing to the proper authorities." Pl. Resp. SMF at ¶ 22. It is undisputed that Georgia Tech maintains a policy regarding the use of pcards and that Plaintiff was issued a pcard as part of his job

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duties. It is also undisputed that Plaintiff signed an acknowledgment form regarding the rules and procedures for using pcards. It is further undisputed that Georgia Tech has a policy on the proper disposal of surplus property, and that Plaintiff's job duties included the scheduling of a surplus equipment pickup. On March 13, 2001, Plaintiff sent an email to faculty and staff in the College of Computing regarding scheduling a surplus equipment pickup in which the Plaintiff stated "I'll get in touch with you on what the procedure is to surplus equipment." Def. SMF at ¶ 21.

*17 Thus, the Plaintiff's concerns about the proper usage of his own pcard and the actions that he was asked to take to dispose of surplus property were concerns that arose as the result of his job duties, and not concerns that the Plaintiff had as a private citizen. Although Plaintiff also spoke about suspicions he had about Beckwith's potential conflict of interest involving a Georgia Tech vendor, the Plaintiff's primary concern when he contacted John Schultz, the Georgia Tech ombudsman, in the fall of 2009 was Beckwith's request for Plaintiff to pay an invoice on Plaintiff's pcard that Plaintiff did not recognize, and Beckwith's request that Plaintiff transfer of Georgia Tech property to students. These are not allegations of fraud, waste, or corruption in general, but concerns by an employee about what he was asked to do as part of his job.

Pickering itself is an example of the sort of employee speech that can relate to a matter of public concern, and the facts of that case are very different from the circumstances in this case. In *Pickering*, a public school teacher submitted a letter to the editor of a local newspaper criticizing the school board and its funding decisions. *Pickering v. Board of Education*, 391 U.S. 563, 565, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). The Supreme Court found that the teacher was acting as a concerned citizen, albeit a particularly informed one because of his employment. As the Court found, protecting free and open debate on such an

issue of public interest required First Amendment protection because "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent." *Id.* at 572.

This case, by contrast, is about a school employee who reported to the administration what he and his supervisor did as part of their ordinary day-to-day performance of their jobs. This is speech tied directly to the speaking employee's role as employee and not as concerned citizen. That the speaking employee puts the blame on the supervisor for instigating or directing the conduct does not render the speech protected by the First Amendment. It remains speech principally about the employee's own purchases and other transactions in which he engaged as part of his job. This falls squarely on the "speaking as employee" side of the *Pickering* line.

Moreover, on these facts, reporting this alleged wrongdoing was within Plaintiff's job responsibilities. Although Plaintiff admits that Georgia Tech had a policy requiring him and other employees to "[r]eport wrongdoing to the proper authorities," Pl. Resp. SMF at ¶ 22, Plaintiff argues that his official job duties did not include scrutinizing his supervisor's directives or ascertaining whether his supervisor's "order" that he permit students to remove possibly surplus office furniture was valid. Pl. Br. at 25. The Eleventh Circuit has addressed similar arguments by government employees who reported wrongdoing or corruption by their superiors and has consistently rejected them. *See, e.g., Boyce*, 510 F.3d at 1346 n. 15 ("In similar situations following *Garcetti* of government employees' challenging their terminations because they reported alleged wrongdoing in government offices, our court determined that commentary by government employees concerning alleged wrongdoing in a government office was related to the government employees' jobs and, therefore, they were not

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speaking as private citizens for the purpose of First Amendment, retaliation claims.”); *Phillips v. City of Dawsonville*, 499 F.3d 1239, 1242 (11th Cir.2007) (*per curiam*) (the City Clerk was acting within the scope of her duties when she reported that the mayor was improperly charging the city for his personal expenses, and thus she spoke out as a government employee and not a citizen although her duties did not include specifically monitoring the mayor's activities); *Vila v. Padron*, 484 F.3d 1334, 1339 (11th Cir.2007) (university's Vice President of External Affairs who reported illegal and unethical conduct by college president was not speaking out as a citizen on a matter of public concern because her allegations “fall squarely within her official job duties and are not protected by the First Amendment”).

*18 The Court further finds instructive the Eleventh Circuit's decision in *Battle v. Board of Regents*, 468 F.3d 755 (11th Cir.2006) (*per curiam*). In *Battle*, the plaintiff was a financial aid counselor in the Office of Financial Aid and Veteran Affairs at Fort Valley State University, and in the course of performing her job duties, the plaintiff discovered improprieties related to her supervisor's fraudulent mishandling and mismanagement of federal financial aid funds. *Id.* at 758. The plaintiff confronted her supervisor, but she was “dismissive” of the plaintiff's concerns and took no corrective action. *Id.* The plaintiff then took her concerns to the president of the university, but he also took no action. *Id.* The plaintiff was eventually informed that her contract would not be renewed, and she claimed that it was in retaliation for her attempt to expose her supervisor's fraudulent activities. *Id.* at 758–59.

U.S. District Judge Thomas W. Thrash of this district granted summary judgment for the defendants in *Battle*^{FN9} and the Eleventh Circuit affirmed on the ground that the plaintiff's speech to university officials about signs of fraud in student files was made pursuant to her official employment responsibilities. *Id.* at 761. The Eleventh Circuit

held that “because the First Amendment protects speech on matters of public concern made by a government employee speaking as a citizen, not as an employee fulfilling official responsibilities, Plaintiff's retaliation claim must fail.” *Id.* at 761–62.

FN9. Judge Thrash did not reach the issue of whether the plaintiff's termination violated her First Amendment right to free speech, instead holding that the defendants were entitled to qualified immunity because the applicable law at the time did not give the defendants fair notice that their conduct would violate the plaintiff's constitutional rights. *See United States ex rel. Battle v. Board of Regents*, Civil Action No. 1:00-CV-1637-TWT, N.D.Ga. (Order dated February 10, 2005).

Plaintiff in this case argues that *Battle* is distinguishable from the facts of this case because in that case, the plaintiff admitted she had a “clear employment duty to ensure the accuracy and completeness of student files as well as to report any mismanagement or fraud she encountered in the student financial aid files.” *Id.* at 761. Unlike the plaintiff in *Battle*, Plaintiff does not admit that his reports about Beckwith's misuse of the Plaintiff's peard and improper disposal of Georgia Tech property stemmed from his official job duties; instead, he argues that his normal job duties “did not include supervising his supervisor or questioning his directives.” Pl. Br. at 26.

Plaintiff's argument fails. First, the plaintiff in *Battle* also argued that she had no specific duty to discover any fraud by her supervisor, but the Eleventh Circuit rejected that argument to find that the plaintiff was nevertheless speaking as an employee and not a private citizen. *Battle*, 468 F.3d at 761 n. 6.

In Plaintiff's supplemental brief addressing *Garcetti*, she attempts to limit the scope of her admission by claiming her only employment

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duties related to her control and oversight of financial aid information provided by certain students, and not to the discovery of fraud by her supervisor, Huff. Plaintiff further argues that she had no official auditing duty to discover fraud because the State of Georgia performed an annual audit of the financial aid files. Regardless of whether Plaintiff had a duty to look for fraud, these assertions do not alter the uncontroverted fact that once Plaintiff did discover mismanagement or fraud within any of the student files, she had a clear duty to report this information. The issue in *Garcetti* was whether a public employee was speaking pursuant to an official duty, not whether that duty was part of the employee's everyday job functions.

*19 *Id.*

Second, since the *Battle* decision, the Eleventh Circuit has further stated that it has “consistently discredited narrow, rigid descriptions of official duties urged upon us to support an inference that public employees spoke as private citizens.” *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1282–86 (11th Cir.2009). Instead, the more important factor to consider is whether the employee's speech “owes its existence” to the employee's performance of his job duties. *Id.* at 1282–83 (citing *Garcetti*, 547 U.S. at 421–22, which defined speech made pursuant to an employee's job duties as “speech that owes its existence to a public employee's professional responsibilities,” and a product that “the employer itself has commissioned or created”). In *Abdur-Rahman*, the Eleventh Circuit rejected the plaintiffs' argument that their official duties did not require them to make the reports at issue. *Id.* at 1284 (“If we had examined only whether the employees' official responsibilities required them to speak, we would have reached a different result in *D'Angelo, Vila* and *Battle*.”). The court found that the plaintiffs only learned of the information that formed the basis of their reports as a result of the performance of their job duties, and thus, they were making the reports in their role as employees, not

citizens. *Id.* at 1283–84.

Speech that owes its existence to the official duties of public employees is not citizen speech even if those duties can be described so narrowly as not to mandate the act of speaking. In that context, “[t]here is no relevant analogue to speech by citizens who are not government employees,” and the speech is unprotected.

Id. at 1285–86 (quoting *Garcetti*, 547 U.S. at 424).

As with the plaintiffs in *Abdur-Rahman*, the Plaintiff in this case only learned of Beckwith's misuse of the Plaintiff's pcard and Beckwith's failure to follow the Georgia Tech surplus property disposal policy as a result of the Plaintiff's performance of his job duties. Plaintiff was assigned a pcard only because he was a Georgia Tech employee, and he was authorized to use it only in the performance of his job duties. Thus, Plaintiff's knowledge of the policy on pcard usage and his obligation to report any misuse of his pcard stemmed from his duties as a Georgia Tech employee. Plaintiff's knowledge of the policy on the disposal of surplus property and his obligation to report any violation of that policy stemmed from his job duties as well. Plaintiff's speech about Beckwith's activities thus “owed its existence” to the Plaintiff's status as a Georgia Tech employee and his performance of his job duties.

Moreover, Plaintiff was not just reporting his supervisor's conduct. Plaintiff was reporting *his own* conduct, in which he engaged in the day-to-day execution of his duties. Plainly, Plaintiff's discussion with his supervisors as to what transactions he engaged in and why as part of his job responsibilities was speech relating to his status as an employee.

*20 In sum, in considering the context, content, and the form of Plaintiff's speech about Beckwith's violations of these policies, the undersigned concludes that Plaintiff's speech was made in

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connection with the Plaintiff's role as a government employee performing his duties. The undersigned finds, therefore, that Defendants are entitled to summary judgment on Plaintiff's claim under 42 U.S.C. § 1983 for the deprivation of his right to free speech under the First Amendment. Accordingly, for that reason, the undersigned **RECOMMENDS** that Defendants' Motion for Summary Judgment [29] be **GRANTED** as to Plaintiff's claim in Count III of the Amended Complaint.

(2) Plaintiff Has Not Established that his Speech Played a "Substantial Part" in His Termination

Plaintiff argues in his brief that "[t]his is the unusual retaliatory discharge case where there is no genuine dispute that the Plaintiff ... was discharged for his protected activities." Pl. Br. at 1. Defendants dispute that contention and argue instead that the undisputed evidence reveals that Plaintiff was not discharged because of his report of Beckwith's policy violations, but was instead discharged because of his own misconduct.^{FN10} Defs. Br. at 3. The Court concludes that, based on the undisputed evidence as set forth in detail above in the statement of facts, Plaintiff has failed to establish that his speech about Beckwith played a "substantial part" in Georgia Tech's decision to terminate his employment. See *Morgan v. Ford*, 6 F.3d 750, 753-754 (11th Cir.1993); *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir.1989). Instead, the undisputed evidence indicates that Plaintiff's termination was based on his own violations of Georgia Tech policy, and not because he reported Beckwith's violations.

FN10. Plaintiff also argues that Defendants are "collaterally estopped" from claiming that he was fired for legitimate and lawful reasons, based on the findings of the IBR and the Georgia Department of Labor ("DOL"). Pl. Br. at 10-11. Plaintiff, however, has cited no legal authority supporting his argument that the findings of either body would have a preclusive

effect equivalent to a finding by a court of law. The undisputed evidence indicates that the IBR merely made a recommendation to the President of Georgia Tech, and Plaintiff has not pointed to any evidence that the IBR's conclusions or recommendations were binding on Georgia Tech in any way. In addition, Georgia law provides that any finding by the DOL "shall not be admissible, binding, or conclusive in any separate or subsequent action or proceeding between a person and such person's present or previous employer." O.C.G.A. § 34-8-122. Accordingly, the undersigned rejects Plaintiff's argument that Defendants are collaterally estopped from arguing that Plaintiff was fired for lawful and legitimate reasons.

Plaintiff is correct about one thing: this is an unusual retaliatory discharge case. It is unusual because it is undisputed that the Defendants initially learned about Plaintiff's violations of Georgia Tech policy only as a result of his report about Beckwith's violations. It also appears to be undisputed that the Plaintiff's decision to turn over the emails about the disposal of the surplus property to students, along with other documents and information he produced to the IA investigators, ultimately led to Georgia Tech's discovery of the Plaintiff's involvement and participation in the policy violations. But that does not mean that Plaintiff was fired "because" of his protected activities, as he argues. The First Amendment does not protect an employee from being sanctioned for misconduct simply because the employee self-reports his own violations. It is the information that was discovered, not how Georgia Tech discovered it, that led to the Plaintiff's termination.

It is true that Defendant Alexander testified during her deposition that, had the Plaintiff not revealed all of the information related to the pcard

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purchases and the disposal of the Georgia Tech property to students, she would “most likely not” have been in a position to recommend the termination of Plaintiff’s employment. Pl. SMF at ¶ 26; Alexander Dep. at 117–118. But as Defendants point out, that is mere speculation. If Plaintiff had not turned over the documents that revealed the information that ultimately led to his termination, it is certainly possible that the information could have come to the attention of Georgia Tech officials from another source, perhaps at a later date. But Plaintiff has pointed to no evidence whatsoever that anyone at Georgia Tech harbored any intention to retaliate against him for speaking out about Beckwith. Instead, the undisputed evidence reveals that Plaintiff admittedly violated Georgia Tech policy regarding the pcard usage and the disposal of surplus property, and that he was fired for his own misconduct, not for his reporting on Beckwith’s misconduct.^{FN11}

FN11. This finding should not be construed as a finding that Plaintiff cannot establish a claim against Defendants under the Georgia Whistleblower Act, however. This finding is limited to Plaintiff’s First Amendment claim, which requires him to present evidence that his speech played a “substantial part” in his termination. Georgia law determines the standard for determining whether Plaintiff has presented sufficient evidence to establish a claim under the Georgia Whistleblower Act. See discussion, *infra*.

*21 In other words, Plaintiff was not terminated as punishment for speaking out about a supervisor’s misconduct, or the fact that he spoke at all. He was terminated because officials at Georgia Tech concluded that the information he provided implicated himself. Plaintiff’s argument appears to be that he should have been given immunity for his own misconduct because he chose to reveal it to Georgia Tech officials voluntarily. Plaintiff, however, has cited no legal authority supporting

such an extension of the First Amendment. If the Court were to accept Plaintiff’s argument, then a public employee could confess to almost any crime, or violation of policy, no matter how egregious, so long as his confession involved the wrongdoing of others, and claim that he was immune from termination because his speech was protected by the First Amendment. This absolutely is not and cannot be the law.

Suppose that Plaintiff confessed that he stole from Georgia Tech, albeit at Beckwith’s direction. Would the First Amendment prevent the employer from terminating Plaintiff, simply because it learned of the misconduct from Plaintiff’s own mouth? Of course the answer is no. Plaintiff in that scenario would be terminated because of his conduct, not because of the fact that he spoke out. The same is true here.

Plaintiff may indeed have just been following Beckwith’s directives, as the IBR concluded. But that does not help him prove his case that Georgia Tech violated his First Amendment rights by firing him because of his report about Beckwith. This Court does not sit in judgment on whether the decision to fire Plaintiff was “correct” or “fair,” in light of his claim that he was only following Beckwith’s orders. Georgia Tech officials are entitled to interpret its policies and rules, and to enforce them, and their decision to terminate Plaintiff’s employment cannot be overturned unless the Plaintiff can point to evidence that the reason was based on unlawful considerations. With respect to Plaintiff’s claim that Georgia Tech violated his First Amendment right to free speech, the Court finds that he has failed to do so.

Thus, the Court finds that Plaintiff has failed to present sufficient evidence that his report about Beckwith played a “substantial part” in Georgia Tech’s decision to terminate his employment. Accordingly, on this alternative ground, the undersigned **RECOMMENDS** that Defendants’ Motion for Summary Judgment [29] be **GRANTED** as to Plaintiff’s claim in Count III of

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the Amended Complaint.

c. Race Discrimination and Equal Protection

In Count IV of the Amended Complaint, Plaintiff asserts a claim under § 1983 and § 1981 for race discrimination and a denial of his equal protection rights. Plaintiff claims that Defendants violated § 1981 by discriminating against him because of his race when they terminated his employment. Plaintiff also claims that Defendants violated his constitutional rights under the Equal Protection Clause of the Fourteenth Amendment, and that Defendants are liable to him for damages and prospective injunctive relief under 42 U.S.C. § 1983.

(1) Legal Standards for Claims of Race Discrimination in Employment under § 1981 and § 1983

*22 Plaintiff has asserted his claim of race discrimination and the denial of his equal protection rights under both §§ 1981 and 1983. 42 U.S.C. § 1981 provides as follows:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are

protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981.

It is well-settled law that § 1981 prohibits race discrimination in both the public and private employment context. *See Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 961 (11th Cir.1997) ("It is well-established that § 1981 is concerned with racial discrimination in the making and enforcement of contracts."); *Brown v. American Honda Motor Co.*, 939 F.2d 946, 949 (11th Cir.1991) ("The aim of the statute is to remove the impediment of discrimination from a minority citizen's ability to participate fully and equally in the marketplace."); *see also St. Francis College v. Al-Khazraji*, 481 U.S. 604, 609, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987) ("Although § 1981 does not itself use the word 'race,' the Court has construed the section to forbid all 'racial' discrimination in the making of private as well as public contracts."). When a plaintiff asserts a claim arising under § 1981 against a public employer, however, § 1983 provides the exclusive remedy against state actors for violations of the rights contained in § 1981. *Butts v. County of Volusia*, 222 F.3d 891, 893 (11th Cir.2000). Thus, Plaintiff in this case must assert his claim for a violation of § 1981 under the remedies provided in § 1983.

In addition, the Equal Protection Clause of the Fourteenth Amendment of the Constitution also prohibits intentional race discrimination in public employment. *See Williams v. Consolidated City of Jacksonville*, 341 F.3d 1261, 1269 (11th Cir.2003); *Cross v. State of Ala.*, 49 F.3d 1490, 1507 (11th Cir.1995). To establish a violation of the Equal Protection Clause, a plaintiff must prove discriminatory motive or purpose. *Whiting v. Jackson State Univ.*, 616 F.2d 116, 122 (5th Cir.1980); ^{FN12} *see also Cross*, 49 F.3d at 1507-1508. The *Whiting* court held that "such intent should be inferred in the same manner as [the Supreme Court] said it is inferred under [Title

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VII].”^{FN13} *Whiting*, 616 F.2d at 121; *Cross*, 49 F.3d at 1507–1508. Thus, in cases in which a plaintiff asserts a claim for race discrimination in the employment context under § 1981 or § 1983, or both, those claims require the same elements of proof and involve the same analytical framework that would be applied to a claim of race discrimination brought under Title VII. See, e.g., *Rice–Lamar v. City of Ft. Lauderdale, Fla.*, 232 F.3d 836, 843 n. 11 (11th Cir.2000); *Cross*, 49 F.3d at 1508; *Howard v. B.P. Oil Co.*, 32 F.3d 520, 524 n. 2 (11th Cir.1994); *Brown v. American Honda Motor Co.*, 939 F.2d 946, 949 (11th Cir.1991).

FN12. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*) the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981.

FN13. “Title VII” refers to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, the federal statute that prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.

*23 Accordingly, the following discussion of the analytical framework applicable to Title VII cases applies equally to Plaintiff’s claim of race discrimination under § 1981 and § 1983. To prevail on a claim of race discrimination, a plaintiff must prove that the defendant acted with discriminatory intent. *Hawkins v. Ceco Corp.*, 883 F.2d 977, 980–981 (11th Cir.1989); *Clark v. Huntsville City Bd. of Educ.*, 717 F.2d 525, 529 (11th Cir.1983). Such discriminatory intent may be established either by direct evidence or by circumstantial evidence meeting the four-pronged test set out for Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). See *Holifield v. Reno*, 115 F.3d 1555, 1561–62 (11th Cir.1997); *Nix v. WLCY Radio/Rahall Comm.*, 738 F.2d 1181, 1184 (11th Cir.1984).

Direct evidence is defined as evidence “that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” Black’s Law Dictionary 596 (8th ed.2004); see also *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1226 (11th Cir.1993); *Carter v. City of Miami*, 870 F.2d 578, 581–82 (11th Cir.1989); *Rollins v. TechSouth Inc.*, 833 F.2d 1525, 1528 n. 6 (11th Cir.1987). Only the most blatant remarks whose intent could only be to discriminate constitute direct evidence. *Clark*, 990 F.2d at 1226; *Carter*, 870 F.2d at 581. Evidence that only suggests discrimination, see *Earley v. Champion Intern. Corp.*, 907 F.2d 1077, 1081–82 (11th Cir.1990), or that is subject to more than one interpretation, see *Harris v. Shelby County Bd. of Educ.*, 99 F.3d 1078, 1083 n. 2 (11th Cir.1996), does not constitute direct evidence. “[D]irect evidence relates to actions or statements of an employer reflecting a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee.” *Caban–Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir.1990); see also *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641–42 (11th Cir.1998).

Evidence that merely “suggests discrimination, leaving the trier of fact to infer discrimination based on the evidence” is, by definition, circumstantial. *Earley v. Champion Int’l Corp.*, 907 F.2d 1077, 1081–82 (11th Cir.1990). Because direct evidence of discrimination is seldom available, a plaintiff must typically rely on circumstantial evidence to prove discriminatory intent, using the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). See *Holifield v. Reno*, 115 F.3d 1555, 1561–62 (11th Cir.1997); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1527–1528 (11th Cir.1997). Under this framework, a plaintiff is first required to create an inference of discriminatory intent, and thus carries

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the initial burden of establishing a *prima facie* case of discrimination. *McDonnell Douglas*, 411 U.S. at 802; *see also Jones v. Bessemer Carraway Medical Ctr.*, 137 F.3d 1306, 1310, *reh'g denied and opinion superseded in part*, 151 F.3d 1321 (11th Cir.1998); *Combs*, 106 F.3d at 1527.

*24 Demonstrating a *prima facie* case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination. *Jones*, 137 F.3d at 1310–1311; *Holifield*, 115 F.3d at 1562; *see Burdine*, 450 U.S. at 253–54. Once the plaintiff establishes a *prima facie* case, the defendant must “articulate some legitimate, nondiscriminatory reason” for the adverse employment action. *McDonnell Douglas*, 411 U.S. at 802; *Jones*, 137 F.3d at 1310. If the defendant is able to carry this burden and explain its rationale, the plaintiff, in order to prevail, must then show that the proffered reason is merely a pretext for discrimination. *See Burdine*, 450 U.S. at 253–54; *Perryman v. Johnson Products Co.*, 698 F.2d 1138, 1142 (11th Cir.1983).

(2) Plaintiff's *Prima Facie* Case

Plaintiff does not contend that he has produced any direct evidence that any of the Defendants harbored a discriminatory intent against him based on his race. Nor has he cited to evidence in the record that any of the Defendants ever expressed any intention to fire Plaintiff because of his race. Thus, his claim of race discrimination rests purely on circumstantial evidence and must be analyzed under the *McDonnell Douglas–Burdine* framework. Under this framework, a plaintiff must first establish a *prima facie* case of unlawful discrimination.

A plaintiff may generally establish a *prima facie* case of unlawful discrimination by showing that: 1) he is a member of a protected class;^{FN14} 2) he was subjected to an adverse employment action by his employer; 3) he was qualified to do the job in question, and 4) the employer treated similarly situated employees outside his protected classification more favorably than it treated him.

See McDonnell Douglas, 411 U.S. at 802; *see also Wright v. Southland Corp.*, 187 F.3d 1287, 1290 (11th Cir.1999); *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir.1997). Although it is undisputed that Plaintiff was qualified for his job and subjected to an adverse employment action when he was fired, Defendants argue that Plaintiff has failed to establish a *prima facie* case of race discrimination because he has not presented any evidence that Georgia Tech treated a similarly situated non-white employee more favorably than it treated Plaintiff. The Court disagrees.

FN14. Although courts continue to include the requirement that a plaintiff establish as part of a *prima facie* case that he is a member of a “protected class,” it is clear that individuals of any race may pursue a claim of race discrimination in employment. *See Wright v. Southland Corp.*, 187 F.3d 1287, 1290 n. 3 (11th Cir.1999) (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278–80, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976)). Thus, the key element of the *prima facie* case is establishing that persons outside of the plaintiff's protected classification (*i.e.*, those of a different race) were treated more favorably by the employer. *See Wright*, 187 F.3d at 1290 n. 3; *see also Crawford v. Carroll*, 529 F.3d 961 (11th Cir.2008) (“Discrimination is discrimination no matter what the race, color, religion, sex, or national origin of the victim.”).

When an employee claims discriminatory discharge, as Plaintiff alleges, the Eleventh Circuit has held that he may establish disparate treatment by showing that his former position was filled by someone outside his protected class. *See, e.g., Hawkins v. Ceco Corp.*, 883 F.2d 977, 982 (11th Cir.1989); *see also McDonnell Douglas Corp.*, 411 U.S. at 802. In this case, it is undisputed that, after the Plaintiff was fired, his position was filled by Anthony McCoy, an African American who was

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promoted internally. Def. Resp. SMF at ¶ 62.

Accordingly, the Court finds that Plaintiff has produced evidence satisfying all four elements of a *prima facie* case of discriminatory discharge. Thus, under the *McDonnell Douglas* framework, the burden shifts to Defendants to produce evidence of a legitimate, non-discriminatory reason for the termination of Plaintiff's employment.

(3) Defendants' Nondiscriminatory Reason

*25 As set forth in the summary of the facts above, the Defendants have presented significant evidence that Plaintiff's employment was terminated for a reason that was unrelated to the Plaintiff's race.^{FN15} In sum, the undisputed evidence demonstrates that the Georgia Tech Internal Audits department investigated Plaintiff's allegations about Beckwith, Plaintiff's supervisor, and based on the information obtained during that investigation, including the Plaintiff's statements, the IA department concluded that Plaintiff himself had also committed numerous violations of Georgia Tech policies regarding the use of pcards and the disposal of surplus property. IA also investigated Plaintiff's claim that Beckwith had "ordered" him to commit those violations, concluded that the evidence did not substantiate Plaintiff's claim, and concluded that Plaintiff was a willing participant in the policy violations.

FN15. Plaintiff argues that Defendants are collaterally estopped from arguing that they fired him for legitimate nondiscriminatory reasons, but the Court rejects that argument. *See* note 10, *supra*. Significantly, Plaintiff has not pointed to any evidence in the record that any body, including the IBR or the DOL or any other entity, ever concluded that Georgia Tech fired him because of his race or otherwise discriminated against him on the basis of his race.

As a result of the IA investigation, Defendant Marita J. Sullivan, who was the Interim Associate

Vice President of Human Resources, and Defendant Pearl J. Alexander, who was the Senior Director of Human Resources, jointly recommended that Georgia Tech terminate the Plaintiff's employment. That decision was supported by Defendant Pamela S. Ruffin, who was the Director of Human Resources for the College of Computing at Georgia Tech, and upheld by Defendant Dr. James D. Foley, who was at that time the Interim Dean in the College of Computing. Plaintiff's Termination Letter was signed by Mike Luttrell, Plaintiff's direct supervisor at the time, and was delivered to Plaintiff on April 20, 2010, by Luttrell and Ruffin. The Termination Letter informed Plaintiff that his employment was terminated effective that day.

Accordingly, the undersigned finds that Defendants have presented evidence of a non-discriminatory reason for Plaintiff's termination. Under the *McDonnell Douglas* framework, the burden thus shifts to Plaintiff to present evidence that Defendants' proffered reason was a mere pretext for unlawful race discrimination.

(4) Pretext

When an employer has presented evidence of a nondiscriminatory reason for the adverse action, the plaintiff may carry his burden of showing that the employer's proffered reasons are pretextual by showing that they have no basis in fact, that they were not the true factors motivating the decision, or that the stated reasons were insufficient to motivate the decision. A plaintiff can either directly persuade the court that a discriminatory reason more likely motivated the employer or show indirectly that the employer's ultimate justification is not believable. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1522 (11th Cir.1991). In other words, the plaintiff can produce evidence, including the previously produced evidence establishing the *prima facie* case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse

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employment decision. *Burdine*, 450 U.S. at 256; *McDonnell Douglas*, 411 U.S. at 804.

*26 Because a plaintiff bears the burden of establishing that a defendant's reasons are a pretext for discrimination, a plaintiff "must present 'significantly probative' evidence on the issue to avoid summary judgment." *Young v. General Foods Corp.*, 840 F.2d 825, 829 (11th Cir.1988) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). "Conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [a defendant] has offered extensive evidence of legitimate, non-discriminatory reasons for its actions." *Young*, 840 F.2d at 830.

In this case, Plaintiff does not dispute that he violated the Georgia Tech policies on pcard usage and the disposal of surplus property. Instead, he argues that he has presented circumstantial evidence that the Defendants discriminated against him on the basis of his race by pointing to various statements by Georgia Tech that it was committed to diversity in its workforce and that, after it fired Beckwith and him, it replaced both of them with African-Americans. The undersigned concludes, however, that Georgia Tech's published statements related to its commitment to diversity do not establish pretext. Indeed, similar statements could be found at almost any other major institution of higher learning. The undisputed evidence indicates that Plaintiff was a Georgia Tech employee for over sixteen years before his employment was terminated in 2010, and he has not cited to a single piece of evidence in the record that anyone at Georgia Tech ever said anything to him throughout those sixteen years indicating any discriminatory animus against him for being white or Caucasian, or any statement indicating a bias against white or Caucasian people in general.

Furthermore, although Defendants contend that Beckwith was not replaced because his duties were redistributed to other employees, it is undisputed

that Plaintiff was replaced in his position by an African-American. That alone does not demonstrate pretext, however, particularly in light of the undisputed evidence that Plaintiff committed the policy violations of which he was accused. Indeed, even the IBR report, which Plaintiff points to as evidence that his termination was unfair or unwarranted, concluded that Plaintiff engaged in "wrongdoing" in various pcard transactions, although the IBR also concluded that Plaintiff had committed a only "minor rules violation" and the violation was not "willful." IBR Report, Pl. Dep., Ex. 13. Thus, although Plaintiff's replacement by an African-American allows him to establish a *prima facie* case of race discrimination under Eleventh Circuit precedent, it does not rise to the level of also establishing pretext. Merely because the Plaintiff was replaced by an African-American does not establish a colorable claim of race discrimination when his employer has presented substantial evidence that it had a legitimate reason to terminate the Plaintiff that was unrelated to his race.

*27 Plaintiff's primary argument that he has presented evidence of pretext ^{FNI6} appears to be that Defendants "injected race" into their decision to terminate his employment when Sullivan asked Alexander to verify the Plaintiff's race before they issued their recommendation regarding his termination. Pl. Br. at 34 ("Georgia Tech injected race into the disciplinary process"). It is undisputed that Sullivan asked Alexander to verify Plaintiff's race and other demographic information because Sullivan wanted to keep track of employee demographic data when adverse actions were taken during her leadership so that she could monitor whether any demographic group was adversely impacted by those actions. Def. SMF at ¶ 48. This evidence fails to establish pretext. Verifying the Plaintiff's race for recordkeeping purposes does not suggest an intent to discriminate on the basis of race. Plaintiff has not cited to any evidence that either Sullivan or Alexander harbored any intent to discriminate against Plaintiff solely because he is

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white.

FN16. In Plaintiff's brief, he does not assert any argument that he has presented specific evidence of pretext. *See* Pl. Br. at 33–37. Instead, he argues only generally that he has presented a “convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker.” *Id.* at 37 (citing *Smith v. Lockheed–Martin Corp.*, 644 F.3d 1321, 1327 (11th Cir.2011)). The undersigned infers that Plaintiff intends for his arguments related to the “circumstantial evidence” of race discrimination to be relevant on the issue of pretext.

Plaintiff also contends that he has presented evidence that Defendants' proffered reason is pretextual by arguing that an African American employee of Georgia Tech, Daron Foreman, committed similar violations of the pcard policy but was not terminated as a result. According to Plaintiff, Beckwith also asked Foreman to violate Georgia Tech policies relating to Foreman's pcard the same way that Beckwith had previously asked Plaintiff. Plaintiff, however, has not pointed to any probative evidence in the record demonstrating that Foreman ever violated Georgia Tech's pcard policy. He cites only his own allegations and suspicions about Foreman's pcard violations. Defendants contend that the IA department investigated Foreman's pcard usage as part of the audit of Beckwith and Plaintiff, and the IA department found that Foreman had not engaged in malfeasance or policy violations on his pcard. Def. SMF at ¶¶ 79–80; Hurd Dep. at 71; Hurd Aff. at ¶ 10. Although Plaintiff contends that IA did not conduct a sufficient investigation to reach this conclusion, he has not pointed to any evidence creating a genuine dispute that IA conducted an investigation and concluded that Foreman had not committed any violations. Plaintiff does not submit or point to evidence of what investigation

Defendants did or did not engage in. Instead, in response to Defendants' Statement of Facts as to Foreman, Plaintiff generally cites to hundreds of pages of exhibits without any specific citation to particular facts. This is unavailing.

Plaintiff also contends that Preethi Reddy–Veluri, an Indian Georgia Tech employee, was not terminated from her employment for allegations of similar misconduct to that of Plaintiff. Again, Plaintiff has not pointed to any evidence that Reddy–Veluri committed any violations of the pcard policy similar to the Plaintiff's violations. Instead, it is undisputed that, when Reddy–Veluri worked at the College of Architecture, she had been permitted to use her pcard to pay for her home Comcast cable bill, which included internet service she used to work from home, and she was permitted to reimburse Georgia Tech for the portion of the bill associated with her cable service. Later, after she began working at the College of Computing, she received a verbal reprimand for continuing to use her pcard to pay for her home Comcast cable bill. Reddy–Veluri also received a written warning for giving out a FEDEX account number to another employee in violation of Georgia Tech policy. In sum, Plaintiff has not pointed to evidence that Reddy–Veluri was ever accused of committing the pcard policy to the same extent that the Plaintiff did; the IA investigation into Plaintiff's misconduct revealed repeated policy violations that he committed over a period of years.

*28 Plaintiff argues further that he has provided evidence that the reasons Defendants gave him for his termination changed over time, or that the Defendants did not give consistent statements about the reasons for his termination. He also contends that the Defendants' use of the word “malfeasance” in reference to his violations of the pcard policy was not accurate, because the evidence indicated that he did not commit any criminal wrongdoing. The undersigned rejects these arguments that this evidence constitutes pretext.

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Quibbles about the definition of the word “malfeasance” do not provide evidence of pretext. Moreover, although the individual Defendants may have used different words to explain the reasons for Plaintiff’s termination, the undisputed evidence in the record indicates that Defendants’ primary reasons for terminating Plaintiff’s employment were consistent over time. The evidence demonstrates that Hurd concluded, based on the results of the IA investigation, that Plaintiff had committed several violations of the pcard policy over a period of several years. Sullivan and Alexander recommended the termination of Plaintiff’s employment based on the IA investigation, and their conclusion that Plaintiff’s violations of the pcard policy were serious enough to warrant termination.

In essence, Plaintiff appears to be challenging these official conclusions as to the seriousness of the violations. Because he claims that Beckwith “ordered” him to commit the pcard policy violations, Plaintiff claims that Georgia Tech should have concluded that the Plaintiff’s own pcard violations were not serious enough to warrant termination, based on his attempts to comply with Beckwith’s directives and his repeated expressions of concern about Beckwith’s use of his pcard to various Georgia Tech officials. But the fact that Georgia Tech’s treatment of Plaintiff may have been harsh or unfair, and that the IBR, or other Georgia Tech officials, may have expressed some doubts as to whether Plaintiff’s violations warranted termination under the circumstances does not show race discrimination.

As the Eleventh Circuit has explained:

Title VII ^{FN17} does not take away an employer’s right to interpret its rules as it chooses, and to make determinations as it sees fit under those rules. Title VII addresses discrimination.... Title VII is not a shield against harsh treatment at the workplace. Nor does the statute require the employer to have good cause for its decisions. The employer may fire an employee for a good

reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason. While an employer’s judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination. The employer’s stated legitimate reason ... does not have to be a reason that the judge or jurors would act on or approve.

FN17. Although the Eleventh Circuit refers to claims brought under Title VII specifically, it has consistently held that claims of race discrimination brought under §§ 1981 and 1983 should be analyzed under the same standard as claims of race discrimination under Title VII. *See* discussion, *supra*.

*29 *Nix v. WLCY Radio/Rahall Comm.*, 738 F.2d 1181, 1187 (11th Cir.1984) (internal quotes and citations omitted); *see also Rojas v. State of Florida*, 285 F.3d 1339, 1344 (11th Cir.2002) (Title VII does not permit courts to sit in judgment of “whether a business decision is wise or nice or accurate”); *Shealy v. City of Albany*, 89 F.3d 804, 806 n. 6 (11th Cir.1996) (court “does not sit as a sort of ‘super personnel officer ... correcting what the judge perceives to be poor personnel decisions”).

In sum, the undersigned finds that Plaintiff has failed to cite to evidence in the record sufficient to demonstrate that Defendants’ proffered reason for terminating his employment is a mere pretext for race discrimination. Accordingly, the undersigned **RECOMMENDS** that Defendants’ Motion for Summary Judgment [29] be **GRANTED** as to Plaintiff’s claim of race discrimination and a violation of his equal protection rights under §§ 1981 and 1983, which is Count IV of the Amended Complaint.^{FN18}

FN18. Because the undersigned concludes

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that Plaintiff has failed to present sufficient evidence to establish the elements of any of his federal claims under § 1983, the undersigned declines to address the individual Defendants' argument that, even if the Plaintiff were able to establish that they violated his constitutional rights, they would be entitled to qualified immunity.

d. Prospective Injunctive Relief and Attorney's Fees

In addition to his substantive claims under § 1983 that the Defendants violated his statutory and constitutional rights, the Plaintiff also asserts non-substantive claims for prospective injunctive relief under § 1983 in Count II of the Amended Complaint, and for attorney's fees under 42 U.S.C. § 1988 in Count VII.

Because the undersigned concludes that Defendants are entitled to summary judgment on Plaintiff's federal claims, they are also entitled to summary judgment on those counts. Accordingly, the undersigned **RECOMMENDS** that Defendants' Motion for Summary Judgment [29] be **GRANTED** as to Plaintiff's claim for prospective injunctive relief under § 1983 in Count II, and Plaintiff's claim for attorney's fees under 42 U.S.C. § 1988 in Count VII. To the extent that Plaintiff requests attorney's fees and expenses under Georgia law in Count VII, that claim is discussed below.

2. Plaintiffs Claims under Georgia Law

a. Counts V and VI

Although Defendants have moved for summary judgment as to all of the Plaintiff's claims, Plaintiff argues in his brief that there are genuine issues of material fact only with respect to three of his claims: his two federal claims brought pursuant to § 1983 and his claim under the Georgia Whistleblower Act. *See* Pl. Br. [36] at 38. Plaintiff has not asserted any arguments in his brief opposing the Defendants' argument that they are entitled to summary judgment on Count V of the Amended Complaint, the claim of negligence under

the Georgia Tort Claims Act, O.C.G.A. § 50-21-24, and Count VI of the Amended Complaint, the claim of breach of implied covenant of good faith and fair dealing.

"In opposing a motion for summary judgment, 'a party may not rely on his pleadings to avoid judgment against him.' " *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir.1995) (quoting *Ryan v. Int'l Union of Operating Eng'rs*, Local 675, 794 F.2d 641, 643 (11th Cir.1986)). This Court does not have the burden of distilling every potential argument that could be made by the parties. *Id.* When a party fails to address a specific claim, or fails to respond to an argument made by the opposing party, the Court deems such claim or argument abandoned. *Id.*; *see also Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir.2004); *Bute v. Schuller International Inc.*, 998 F.Supp. 1473, 1477 (N.D.Ga.1998).

*30 The Court thus finds that Plaintiff has abandoned his claim of negligence under the Georgia Tort Claims Act, O.C.G.A. § 50-21-24, and his claim of breach of implied covenant of good faith and fair dealing. Accordingly, the undersigned **RECOMMENDS** that Defendants' Motion for Summary Judgment [29] be **GRANTED** as to those claims asserted in Count V and Count VI of the Amended Complaint.

b. Georgia Whistleblower Act

In Count I of the Amended Complaint, Plaintiff asserts a claim for retaliation under the Georgia Whistleblower Act, O.C.G.A. § 45-1-4 ("GWA"), which provides, in relevant part, as follows:

(d) (1) No public employer shall make, adopt, or enforce any policy or practice preventing a public employee from disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency.

(2) No public employer shall retaliate against a public employee for disclosing a violation of or noncompliance with a law, rule, or regulation to

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either a supervisor or a government agency, unless the disclosure was made with knowledge that the disclosure was false or with reckless disregard for its truth or falsity.

(3) No public employer shall retaliate against a public employee for objecting to, or refusing to participate in, any activity, policy, or practice of the public employer that the public employee has reasonable cause to believe is in violation of or noncompliance with a law, rule, or regulation.

(4) Paragraphs (1), (2), and (3) of this subsection shall not apply to policies or practices which implement, or to actions by public employers against public employees who violate, privilege or confidentiality obligations recognized by constitutional, statutory, or common law.

(e) (1) A public employee who has been the object of retaliation in violation of this Code section may institute a civil action in superior court for relief as set forth in paragraph (2) of this subsection within one year after discovering the retaliation or within three years after the retaliation, whichever is earlier.

O.C.G.A. §§ 45-1-4(d) and (e).

Although Plaintiff has abandoned his other claims asserted under Georgia law, he strongly opposes Defendants' Motion for Summary Judgment on his claim under the GWA. Plaintiff argues that he presented sufficient evidence to establish a claim that Defendants violated the GWA when it terminated his employment on the basis of the information they learned only as a result of his attempt to disclose what he believed were Beckwith's violations of Georgia Tech policies.

As discussed above, Plaintiff initiated this action on April 29, 2011, by filing a complaint in the Superior Court of Fulton County. Defendants removed the case to this Court on the basis of federal question jurisdiction under 28 U.S.C. § 1331, and the Court is recommending dismissal of

all federal claims. Thus, if this recommendation is adopted, the Court would have only supplemental jurisdiction over the Plaintiff's GWA claim and his other state law claims under 28 U.S.C. § 1367. When a federal court dismisses all claims that give rise to federal jurisdiction, it may decline to exercise supplemental jurisdiction over the remaining state law claims. *See* 28 U.S.C. § 1367(c) ("The district courts may decline to exercise supplemental jurisdiction over a claim ... if ... (3) the district court has dismissed all claims over which it has original jurisdiction[.]").

*31 Indeed, the Supreme Court in *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), instructs us to do exactly that—decline to exercise supplemental jurisdiction—when the federal claims are dismissed before trial. As the Court in *Gibbs* explained:

Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

Id.

" 'State courts, not federal courts, should be the final arbiters of state law.' " *Ingram v. School Bd. of Miami-Dade County*, 167 Fed. Appx. 107, 108 (11th Cir.2006) (quoting *Baggett v. First Nat'l Bank of Gainesville*, 117 F.3d 1342, 1353 (11th Cir.1997)). "In determining whether to continue to exercise supplemental jurisdiction for state-law claims after all claims over which it has original jurisdiction have been dismissed, [the] district court should take into account concerns of comity, judicial economy, convenience, fairness, and the like" before remanding the state law claims. *May v. Boyd Bros. Transp., Inc.*, 241 Fed. Appx. 646, 647 (11th Cir.2007) (*per curiam*) (citations and internal quotation marks omitted).

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In this action, the undersigned finds that concerns of comity, judicial economy, convenience, and fairness to the parties are best served by remanding the Plaintiff's GWA claim. As discussed above, the facts of this case are somewhat unusual. According to Plaintiff, "[t]his is the unusual retaliatory discharge case where there is no genuine dispute that the Plaintiff ... was discharged for his protected activities." Pl. Br. at 1. Although Defendants dispute that contention, it appears to be undisputed that Defendants only learned about Plaintiff's violations of Georgia Tech policy as a result of his report about Beckwith's violations. It also appears to be undisputed that the Plaintiff's disclosure of the emails about the disposal of the surplus property to students, along with other information he produced to the IA investigators, ultimately led to Georgia Tech's discovery of the Plaintiff's participation in the policy violations and the decision to terminate Plaintiff's employment.

Thus, the resolution of the Plaintiff's GWA claim will involve a thorough analysis of the scope of the protection provided by the GWA for public employees in the State of Georgia who disclose violations by their supervisors. Furthermore, it will also involve a consideration of the statute of limitations and the application of the Georgia "discovery rule" to claims brought under the GWA. The Court finds that these issues would be better handled by a state court with a "a surer-footed reading of applicable law." *Gibbs*, 383 U.S. at 726. Indeed, under the facts of this case, it appears that Plaintiff's central claim is his GWA claim. See *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 744 (11th Cir.2006) ("A federal court will find substantial predominance when it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage." (internal citation and quotes omitted)). The clear instruction from *Gibbs*, as this case remains in the pretrial stage, is for the District Court to decline to consider the merits of the GWA claim.

*32 In a case such as this one, when the case

was originally filed in state court and subsequently removed to federal court, the Eleventh Circuit has stated that "precedent dictates" that the district court remand the remaining claims to state court, rather than dismiss those state law claims without prejudice. See *May*, 241 Fed. Appx. at 647 (citing, e.g., *Cook ex rel Estate of Tessier v. Sheriff of Monroe County*, 402 F.3d 1092, 1123 (11th Cir.2005); *Lewis v. City of St. Petersburg*, 260 F.3d 1260, 1267 (11th Cir.2001)); accord *Murray v. Marks*, No. 4:10-CV-126 (CDL), 2012 WL 359702, at *3 (M.D.Ga. February 2, 2012) (declining to exercise supplemental jurisdiction stating, "Although dispositive motions are currently pending before the Court, district courts are encouraged 'to dismiss any remaining state claims when, as here, the federal claims have been dismissed prior to trial.' ") (quoting *Murphy v. City of Aventura*, 383 Fed Appx. 915, 919 (11th Cir.2010) (internal quotation marks omitted)).

Having recommended that summary judgment be entered in favor of the Defendants as to all of Plaintiff's federal claims-which claims were the sole basis upon which Defendants removed the action to this court-the undersigned recommends that the District Court decline to exercise supplemental jurisdiction on the Plaintiff's GWA claim. Accordingly, the undersigned **RECOMMENDS** that Defendants' Motion for Summary Judgment [29] be **DENIED** with respect to Plaintiff's GWA claim asserted in Count I of the Amended Complaint, and that the claim be **REMANDED** to the Superior Court of Fulton County.

To the extent that Plaintiff has requested attorney's fees and expenses under Georgia law in Count VII, and punitive damages under Count VIII, the undersigned **RECOMMENDS** that such claims also be **REMANDED**, to the extent that such relief is available under Georgia law in connection with Plaintiff's GWA claim.

III. RECOMMENDATION

For all the above reasons, **IT IS**

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RECOMMENDED that Defendants' Motion for Summary Judgment [29] be **GRANTED IN PART, DENIED IN PART.**

IT IS RECOMMENDED that the Motion for Summary Judgment [29] be **GRANTED** as to Counts II, III, IV, V, and VI of the Amended Complaint and that judgment be entered in favor of all Defendants as to those claims.

IT IS FURTHER RECOMMENDED that the Defendants' Motion for Summary Judgment [29] be **DENIED** as to Count I of the Amended Complaint, and that the Plaintiff's claim under the Georgia Whistleblower Act be **REMANDED** to the Superior Court of Fulton County, along with Plaintiff's request for punitive damages in Count VII, and his request for attorney's fees and expenses in Count VIII, to the extent that Plaintiff is entitled to that relief under Georgia law.

As this is a Final Report and Recommendation, there is nothing further in this action pending before the undersigned. Accordingly, the Clerk is **DIRECTED** to terminate the reference of this matter to the undersigned.

N.D.Ga.,2013.
Ramsey v. Board of Regents of University System of Georgia
Not Reported in F.Supp.2d, 2013 WL 1222492 (N.D.Ga.)

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APPENDIX B

Not Reported in F.Supp.2d, 2009 WL 483818 (D.S.C.)
(Cite as: 2009 WL 483818 (D.S.C.))

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Only the Westlaw citation is currently available.

United States District Court,
D. South Carolina,
Columbia Division.
Franklin D. MAPLES, Jr., Plaintiff,

v.

CITY OF COLUMBIA, and Bradley Anderson, in
his individual capacity, Defendants.

C/A No. 3:07-3568-CMC-JRM.
Feb. 23, 2009.

West KeySummaryCivil Rights 78 ↪1179

78 Civil Rights
78II Employment Practices
78k1164 Sex Discrimination in General
78k1179 k. Discrimination Against Men;
Reverse Discrimination. Most Cited Cases

Civil Rights 78 ↪1234

78 Civil Rights
78II Employment Practices
78k1232 Reverse Discrimination
78k1234 k. Race, Color, Ethnicity, or
National Origin. Most Cited Cases

A white male employee failed to demonstrate that his employer's reasons for not promoting him to the position of Fire Marshall were pretextual. The employee claimed that the Fire Chief who made recommendations concerning promotion was predisposed to reverse discrimination and consciously considered race and gender when making employment decisions. While the Fire Chief had made comments about diversity, they were too general or ambiguous to show discrimination in the decision to not promote the employee. Civil Rights Act of 1964, § 701, 42 U.S.C.A. § 2000e.

Benjamin M. Mabry, Cromer and Mabry,
Columbia, SC, for Plaintiff.

W. Allen Nickles, III, Gergel Nickles and Solomon,
Columbia, SC, for Defendants.

OPINION and ORDER

CAMERON McGOWAN CURRIE, District Judge.

*1 Through this action, Plaintiff Franklin D. Maples, Jr. ("Maples") seeks recovery under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq.* ("Title VII"), from his employer, the City of Columbia ("City"), for the City's failure to promote him to the position of Fire Marshal. Specifically, Maples alleges that the City denied him a promotion to the position of Fire Marshal because of his race (Caucasian) and gender. In addition, Plaintiff asserts a claim against his immediate supervisor, Bradley Anderson, pursuant to 42 U.S.C. § 1983.

BACKGROUND

In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2)(e), (g), DSC, this matter was referred to United States Magistrate Judge Joseph R. McCrorey for pre-trial proceedings and a Report and Recommendation ("Report"). On January 29, 2009, the Magistrate Judge issued a Report recommending that Defendants' motion for summary judgment be granted as to both the Title VII and Section 1983 claims. The Magistrate Judge advised the parties of the procedures and requirements for filing objections to the Report and Recommendation and the serious consequences if they failed to do so.

Plaintiff timely filed objections as to the Title VII claim only. *See* Dkt No. 34 ("*Plaintiff's objections apply only to Defendant City; he does not seek to maintain Chief Bradley Anderson as a Defendant in this case and he hereby stipulates to the Fire Chief's dismissal.*") (emphasis in original); Dkt. No. 1 ¶¶ 4, 5, 12 & 17 (complaint, asserting Title VII claim solely against City and Section 1983 claim solely against Anderson). Defendant filed a responsive memorandum addressing Plaintiffs

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objections. The matter is now before the court for review of the Report and Recommendation.

STANDARD

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the court. *See Mathews v. Weber*, 423 U.S. 261, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976). The court is charged with making a *de novo* determination of any portion of the Report and Recommendation of the Magistrate Judge to which a specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b). In the absence of an objection, the court reviews the Report and Recommendation only for clear error. *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir.2005) (stating that “in the absence of a timely filed objection, a district court need not conduct a *de novo* review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation”) (citation omitted).

DISCUSSION

The court has made a *de novo* review of the Report and underlying record as to all matters to which Plaintiff lodged an objection and has reviewed the Report for clear error as to other matters. Having done so, the undersigned finds no substantive errors in the Report and concurs with the Report in its analysis. The court does, however, note one typographical error in the last paragraph on page 14 of the Report where it refers to “Bradley.” The reference is clearly to Fire Chief Bradley Anderson. Except for this minor, non-substantive error, the court adopts the Report in all respects.

CONCLUSION

*2 For the reasons set forth above, the court adopts the Report in full and grants summary

judgment in full.

IT IS SO ORDERED.

REPORT AND RECOMMENDATION

JOSEPH R. McCROREY, United States Magistrate Judge.

Plaintiff, Franklin D. Maples, Jr. (“Maples”), commenced this action in the Court of Common Pleas for Richland County on October 5, 2007. Defendants, the City of Columbia (the “City”) and Bradley Anderson (“Anderson”) removed this action to this court on October 30, 2007. Maples alleges a claim under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* (“Title VII”) against the City. He also alleges a claim against Anderson, in his individual capacity, under 42 U.S.C. § 1983 (“1983”).^{FN1} On June 16, 2008, Defendants filed a motion for summary judgment. Maples filed a response on July 28, 2008, and Defendants filed a reply on August 5, 2008.

FN1. Pretrial matters in this case were referred to the undersigned pursuant to Rule 73.02(B)(2)(g), DSC. Because this is a dispositive motion, this report and recommendation is entered for review by the court.

SUMMARY JUDGMENT STANDARD

When no genuine issue of any material fact exists, summary judgment is appropriate. *Shealy v. Winston*, 929 F.2d 1009, 1011 (4th Cir.1991). The facts and inferences to be drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Id.* Courts take special care when considering summary judgment in employment discrimination cases because states of mind and motives are often crucial issues. *Ballinger v. North Carolina Agric. Extension Serv.*, 815 F.2d 1001, 1005 (4th Cir.), *cert. denied*, 484 U.S. 897, 108 S.Ct. 232, 98 L.Ed.2d 191 (1987). This does not mean that summary judgment is never appropriate in these cases. To the contrary, “the mere existence of *some* alleged factual dispute

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between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). “Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice.” *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir.1985).

In this case, defendant “bears the initial burden of pointing to the absence of a genuine issue of material fact.” *Temkin v. Frederick County Comm’rs*, 945 F.2d 716, 718 (4th Cir.1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). If defendant carries this burden, “the burden then shifts to the non-moving party to come forward with facts sufficient to create a triable issue of fact.” *Id.* at 718–19 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

Moreover, “once the moving party has met his burden, the nonmoving party must come forward with some evidence beyond the mere allegations contained in the pleadings to show there is a genuine issue for trial.” *Baber v. Hosp. Corp. of Am.*, 977 F.2d 872, 874–75 (4th Cir.1992). The non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. *Id.* and *Doyle v. Sentry Inc.*, 877 F.Supp. 1002, 1005 (E.D.Va.1995). Rather, the non-moving party is required to submit evidence of specific facts by way of affidavits (*see* Fed.R.Civ.P. 56(e)), depositions, interrogatories, or admissions to demonstrate the existence of a genuine and material factual issue for trial. *Baber*, citing *Celotex Corp.*, *supra*. Moreover, the non-movant’s proof must meet “the substantive evidentiary standard of proof that would apply at a trial on the merits.” *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1316 (4th Cir.1993) and *DeLeon v. St. Joseph Hospital, Inc.*,

871 F.2d 1229, 1233 (4th Cir.1989), n. 7. Unsupported hearsay evidence is insufficient to overcome a motion for summary judgment. *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547 (5th Cir.1987) and *Evans v. Technologies Applications & Servs. Co.*, 80 F.3d 954 (4th Cir.1996).

FACTS

*3 1. Maples, a white male, has been employed by the City of Columbia since approximately 1984. He has been an Assistant Fire Marshal since 2002. Maples Aff., Para. 1; Maples Dep. 5–7.

2. Anderson is the Fire Chief for the City. *See* Anderson Aff., Para. 1.

3. Aubrey Jenkins (“Jenkins”) is the Deputy Fire Chief for the City. Jenkins Aff., Para. 1.

4. Charles P. Austin, Sr. (“Austin”) is the City Manager. Austin Aff., Para. 1.

5. After the retirement of Fire Marshal John Reich until the appointment of Joseph Floyd as Fire Marshal, Maples served as Acting Fire Marshal for approximately six months. During that time, Maples’ performance evaluation reflected that he exceeded expectations. *See* Plaintiff’s Opp. Mem. at 2; Maples Aff., Para. 3.

6. The position of Fire Marshal became vacant again in September 2005, upon the retirement of former Assistant Fire Chief, Joseph Floyd, a white male. *See* Anderson Dep. 12, 19.

7. The Columbia Municipal Code provides for the appointment of the Fire Marshal by the City Manager upon recommendation of the Fire Chief. City of Columbia Municipal Code 9–62(b)[Defendants’ Ex. N]; Maples Dep. 85.

8. Maples, George Adams (“Adams”), a white male, and Carmen Floyd (“Floyd”), a woman of unidentified race,^{FN2} were Assistant Fire Marshals at that time. *See* Anderson Dep. 19.

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FN2. Although Floyd's race has not been identified, the parties appear to agree that Floyd is not Caucasian. *See* Plaintiff's Opp. Mem. at 2; Anderson Dep. 24. Floyd is not related to Joseph Floyd.

9. Anderson states that he failed to find an obvious internal candidate to fill the Fire Marshal position and decided to open the position for application to individuals outside of the City of Columbia Fire Department. Anderson Dep. 17.

10. In the interim, Anderson assigned supervisory duties in the Fire Prevention Division to the three Assistant Fire Marshals. Anderson states that all three (Maples, Floyd, and Adams) did a good job. Anderson Dep. 19, 33.

11. In a January 2007 memorandum, Anderson outlined the process for selecting the Fire Marshal as follows:

- a. Publication of notice of vacancy and solicitation of applicants.
- b. Telephone interviews of applicants by members of the Command Staff.
- c. Development of a written exercise on two topics relevant to fire prevention and leadership.
- d. Review and scoring of the written exercise by Anderson, Deputy Fire Chief Jenkins, and retired Fire Marshal Greg Faggart (Faggart").^{FN3}

FN3. Faggart retired from the City of Concord, North Carolina Fire Department, where he held the position of Fire Marshal. He is a friend of Anderson. The two worked together in the Fire Prevention Division of the Charlotte Fire Department. Faggart Aff., Para. 1; Anderson Dep. 82.

- e. Development of written questions and instructions for interviews of applicants.
- f. Selection of an interview panel. The selected

members of the panel included: (1) Jenkins (black male); (2) Bart Massey ("Massey") (white male), a retired City of Charlotte Fire Marshal; (3) John Dooley ("Dooley") (white male), Director of Utilities and Engineering for the City of Columbia; (4) Missy Gentry ("Gentry") (white female), Public Works Director for the City of Columbia; (5) Jacques Gilliam ("Gilliam"), Director of Human Resources for the City of Columbia; and (6) Henry Hopkins ("Hopkins") (black male), Eau Claire Community Council Director.

*4 g. Addition of written exercise and interview scores.

h. Personal interviews by Anderson.

i. Written recommendation to the City Manager.

Austin Aff., Ex. A.

12. Maples and Floyd, along with other inside and outside applicants, submitted applications for the position.

13. The written exercise asked applicants to outline steps they would take to provide incentives to install sprinkler systems where they were not required by Code and to describe their plan to improve motivation in the Fire Prevention Division. Faggart Aff., Ex. A.

14. Maples was selected as one of the nine finalists to participate in the evaluation process. The candidates, including Maples, were asked seven questions by the interview panel.

15. Maples scored ninth out of the nine final candidates on the two written questions. Floyd scored fifth on one question and sixth on the other written question. On the oral board interview, Maples scored second and Floyd scored first out of the nine final candidates. When the scores were combined, Floyd scored third and Maples scored eighth out of the nine final candidates. The two applicants scoring higher

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than Floyd were from Florida. Of the four finalists ranked below Floyd and above Maples, two were black males and two were white males. Austin Aff., Ex. A; Anderson Aff., Para. 5 and Ex. A.

16. Anderson states that he did not recommend the selection of either Florida candidate as one had a history of changing jobs and the other had experience limited to a small fire department. Austin Aff., Ex. A; Anderson Dep. 24.

17. In a memorandum to City Manager Austin, Anderson recommended Floyd be selected as Fire Marshal. He identified the process, participants in the process, and scores of the finalists for the position. Anderson stated that Floyd:

was the only candidate who had all of the following attributes: The knowledge required for the position, excellent organizing skills, a zeal for the job demonstrated by a high energy level, a plan for the Fire Prevention Division and a background in supervision. Daily in her current position, she demonstrates good leadership and interpersonal relations and produces both consistent and high quality work.

Austin Aff., Ex. A.

18. Austin states that he accepted Anderson's recommendation, relying on the reasons contained in Anderson's memorandum. He states that neither Floyd's race nor gender were motivating factors in his decision. Austin Aff., Para. 4.

19. At the time Floyd was selected as Fire Marshal, Battalion Chief Richard A. Dunn (white male) was promoted to the position of Assistant Chief for Professional Services and Battalion Chief Cam Gilliam (white male) was appointed to head the Administrative Division. Maples Dep. 46-47.

20. Maples testified that Anderson stated (while

announcing Floyd's promotion) he was glad the first female Fire Marshal was appointed on his watch, but her sex was not a factor in the promotion. Maples Dep. 47-48.

*5 21. Following her promotion, Floyd participated in an advanced supervisory course at Midlands Technical College. *See* Anderson Dep. 35-37.

22. Maples had the opportunity to grieve the selection of Floyd for the Fire Marshal position, but chose not to do so. Maples Dep. 38-39.

DISCUSSION

Maples alleges that Defendants discriminated against him in violation of Title VII and § 1983 by failing to promote him based on his race and/or gender. Defendants contend that they are entitled to summary judgment because Maples cannot state a prima facie case of discrimination or show pretext in the selection of the Fire Marshal. Anderson contends that he is entitled to summary judgment based on qualified immunity.

A. Title VII Claim

Maples alleges that the City discriminated against him based on his race and/or gender because he was not promoted to the position of Fire Marshal. Title VII makes it "an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...." 42 U.S.C. § 2000e-2(a) (1). A plaintiff may proceed under ordinary principles of proof using direct or indirect evidence, or, in the absence of direct proof^{FN4} of a defendant's intent to discriminate, a plaintiff can employ the scheme outlined in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) to establish a prima facie case of discrimination.

FN4. Maples has not presented any direct

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evidence of discrimination. The Fourth Circuit defines “direct evidence” as evidence that the employer “announced, admitted, or otherwise indicated that [the forbidden consideration] was a determining factor ...” *Cline v. Roadway Express, Inc.*, 689 F.2d 481, 485 (4th Cir.1982) (citing *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1113 (4th Cir.), *cert. denied*, 454 U.S. 860, 102 S.Ct. 316, 70 L.Ed.2d 158 (1981)). In other words, direct evidence is “evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision.” *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir.1995).

A plaintiff establishes a prima facie case of discriminatory failure to promote by showing:

- (1) he is a member of a protected group,
- (2) he applied for the position in question,
- (3) he was qualified for the position, and
- (4) he was rejected under circumstances giving rise to an inference of unlawful discrimination.

Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 268 (4th Cir.2005). The burden of establishing a prima facie case is not an onerous one. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Under the familiar burden-shifting framework of the analysis for Title VII actions, once the plaintiff carries the initial burden of proving a prima facie case,^{FN5} the employer bears the burden of articulating a legitimate, non-discriminatory reason for the challenged employment decision. *McDonnell Douglas*, 411 U.S. at 802. If the employer provides the required evidence of a non-discriminatory reason for the action, a plaintiff must then show that the proffered reasons were a pretext for discrimination. *Id.* at

804; *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

FN5. Title VII prohibits discrimination against all groups, including majority groups (such as Caucasians) which have been historically favored. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279–280, 296, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976). Courts are split on whether a non-minority plaintiff is entitled to the same inference of discrimination as a minority plaintiff when he or she proves a prima facie case. The Sixth, Eighth and District of Columbia Circuits have held that a reverse discrimination plaintiff only raises an inference of impermissible racial discrimination when he or she both satisfied the *McDonnell Douglas* prima facie test and also presents evidence of background circumstances to support the suspicion that the defendant discriminates against whites. *See Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67–68 (6th Cir.1985); *see also Donaghy v. Omaha*, 933 F.2d 1448, 1458 (8th Cir.1991), *cert. denied*, 502 U.S. 1059, 112 S.Ct. 938, 117 L.Ed.2d 109 (1992); *Lanphear v. Prokop*, 703 F.2d 1311, 1315 (D.C.Cir.1983). The Eleventh Circuit has held that a reverse discrimination plaintiff raises an inference of impermissible racial discrimination when he or she satisfied the *McDonnell Douglas* prima facie test. *See Wilson v. Bailey*, 934 F.2d 301, 304 (11th Cir.1991).

There is no Fourth Circuit decision on this issue. In *Stock v. Universal Foods Corp.*, 817 F.Supp. 1300 (D.Md.1993), *aff'd*, 16 F.3d 411 (4th Cir.1994), *cert. denied*, 513 U.S. 813, 115 S.Ct. 66, 130 L.Ed.2d 22 (1994), the District Court used the traditional *McDonnell Douglas* analysis. *Id.* at 1306. The Fourth Circuit

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upheld the District Court opinion on appeal in an unpublished opinion, but did not decide on the proper standard to be used. *See Stock v. Universal Foods Corp.*, No. 93-1448, 1994 WL 10682 *3, n. 2 (4th Cir.1994)[Table], *cert. denied*. 513 U.S. 813, 115 S.Ct. 66, 130 L.Ed.2d 22 (1994). Thus, for purposes of summary judgment, the undersigned finds that if Plaintiff establishes his prima facie case, he is entitled to this rebuttable presumption.

(1) *Prima Facie Case*

Maples asserts that he has established a prima facie case of discrimination. Defendants contend that Maples has not established his prima facie case. They, however, do not address why they believe Maples has not done so. *See* Defendants Opp. Mem. at 10-11. In their reply, Defendants do not specifically address Maples' prima facie case. Thus, at least for purposes of summary judgment, it appears that Defendants do not dispute that Plaintiff has established his prima facie case.

(2) *Legitimate, Non-Discriminatory Reason*

*6 Defendants have articulated a legitimate, non-discriminatory reason for selecting Floyd, that she received higher scores on the written exercise and oral interview. Austin states that he accepted Anderson's recommendation, relying on the reasons contained in Anderson's memorandum. Austin Aff., Para. 4. (Anderson Memorandum). Anderson, in the memorandum, stated that his recommendation was based on Floyd's scoring in the process; her knowledge, excellent organizing skills, zeal for the job demonstrated by a high energy level, plan for the Fire Prevention Division, and background in supervision; her good leadership and interpersonal relations; and her consistent and high quality work. Austin Aff., Ex. A.

(3) *Pretext*

Maples claims that he has shown pretext because: (1) he was objectively more qualified than Floyd for the Fire Marshal position; (2) the

selection process was biased and discriminatory; and (3) he has presented evidence that Anderson consciously considers race and gender when making employment decisions. "A plaintiff alleging a failure to promote can prove pretext by showing that he was better qualified, or by amassing circumstantial evidence that otherwise undermines the credibility of the employer's stated reasons." *Heiko v. Colombo Savings Bank, F.S.B.*, 434 F.3d 249, 259 (4th Cir.2006).

(a) *Qualifications*

Maples claims that he has shown pretext because he was better qualified for the position than Floyd. Specifically, Maples claims that he was better qualified than Floyd because Floyd had no management experience, he (Maples) had management experience and was already successfully doing the job, Floyd was sent to take a management class after her selection for the position, and Anderson commented that he hoped Floyd would grow into the job. Defendants contend that Maples fails to show pretext based on his qualifications because Floyd received higher scores in the selection process than Maples. They also appear to argue (Defendants' Motion for Summary Judgment at 2) that Plaintiff's greater number years of experience is not enough to show pretext as there were many factors involved in the decision.

Maples cannot rely on his qualifications to establish pretext because he has not presented evidence that would allow a reasonable jury to conclude that he was better qualified than Floyd. ^{FN6} Both Maples and Floyd were at least minimally qualified to serve as Fire Marshal. Anderson testified that he found that Floyd had supervisory skills and sufficient experience to perform the duties of Fire Marshal. *See* Anderson Dep. 16-20, 22-23. Anderson also testified that none of the candidates had the necessary management experience and although Maples had more supervisory experience, it was only for a short period of time. Anderson Dep. 17.

FN6. The Fourth Circuit has stated that,

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when comparing the relative job qualifications of two candidates, if “the plaintiff has made a strong showing that his qualifications are demonstrably superior, he has provided sufficient evidence that the employer’s explanation may be pretext for discrimination.” *Heiko*, 434 F.3d at 261–62. But where “a plaintiff asserts job qualifications that are similar or only slightly superior to those of the person eventually selected, the promotion decision remains vested in the sound business judgment of the employer.” *Id.* at 261 (citing *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 649 & n. 4 (4th Cir.2002) (emphasis added); *Evans*, 80 F.3d at 960).

Maples appears to argue that he had more supervisory experience than Floyd and thus he should have been chosen for the job. He has presented nothing, however, to show that supervisory experience was the only or most important qualification of the job or that Floyd did not at least minimally meet this requirement. Maples’ self-assessment of his superior qualifications fails to rebut Defendants’ legitimate explanation that Floyd was chosen based on the results of the written exercise and interviews. *See, e.g., Anderson*, 406 F.3d at 269 (holding that a Title VII plaintiff “cannot establish her own criteria for judging her qualifications for the promotion” but “must compete for the promotion based on the qualifications established by her employer”). Maples has presented no information to dispute that he was rated higher than Floyd by the panels who evaluated his written exercise and interview or that his combined score was higher than Floyd’s score.

*7 Maples argues that Floyd’s lack of management experience is shown by Anderson’s comment to Irmo Fire Marshal Jeff Allen (“Allen”) that he hoped Floyd would mature and grow into the job. Anderson, however, testified that the comment was in the context of maintaining good

relations with a neighboring fire department. Anderson stated that Allen (who had been a candidate, but had withdrawn his application) as well as Floyd would also have needed to grow into the position. Tr. 45–56.

Maples fails to show that he was better qualified than Floyd based on her being sent to training. Anderson denies that Floyd was scheduled for advanced supervisory training because she was not qualified for the position of Fire Marshal. He states that in the past two years (prior to August 2008) he has scheduled this training for seven members of his staff (in addition to Floyd) including six white males and one was a black male. Anderson further states that three white males and one black male are scheduled to take the class in 2008. Anderson Supplemental Aff., Para. 3.

(b) *Discriminatory Selection Process*

Maples claims that the selection process was designed and manipulated by Anderson in a manner to favor Floyd and disfavor Maples because the written questions were developed by Anderson; the written questions were evaluated by Anderson, Anderson’s loyal deputy Jenkins, and Anderson’s friend Faggart; Anderson preselected Floyd and made it known to Jenkins and Austin (who knew the race and gender of the applicants); and the rating panel for the oral boards included Jenkins. Defendants contend that Maples fails to show that the selection process was discriminatory.

Maples fails to show pretext based on the selection process. Massey, Jenkins, Dooley, Gentry, Gilliam, and Hopkins all deny that race or gender played a role in their assessment of the candidates and state that Anderson did not attempt to influence their assessment of the applicants. *See Massey, Jenkins, Dooley, Gentry, Gilliam, and Hopkins Affs.* Jenkins states that he did not consult with Anderson or Faggart in scoring the written questions. Jenkins Aff., Para. 3. Anderson denies that Maples would have been appointed to the position of Fire Marshal but for his gender and/or race. Anderson Aff., Para. 5. Austin states that

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neither Floyd's race nor gender were motivating factors in his decision. Austin Aff., Para. 2. Faggart states that the written questions were delivered to him in North Carolina and he did not know the race or gender of the applicants. He also denies race or gender played any role in his review or scoring of the materials. Faggart Aff., Paras. 3 and 9. Further, Maples testified that he had no objection to the written component of the process or the questions, no reason to believe that any question was unfair or biased, and no reason to believe that any member of the panel was biased against him. Maples Dep. 37-38.

Review of the scores on the written questions does not support a theory that Anderson attempted to gain favor for Floyd, as she was rated fifth and sixth on the questions of the nine final applicants. Even if Jenkins' oral interview scores were not considered in the process, Floyd would have scored well above Maples on the oral interview portion of the process.^{FN7} See Anderson Aff., Ex. A; Jenkins Aff., Appendices B and C.

FN7. Floyd received 712 points on the interview portion of the process and Maples received 632. Jenkins' scores were 95 for Maples and 102 for Floyd, a difference of only 7 points. The largest part of the 80 point differential is by Dooley (white male) who scored Maples at 109 and Floyd at 140. See Attachments to Anderson, Jenkins, and Dooley Affs.

(c) *Consideration of Race and Gender in Employment Decision*

*8 Maples also claims that he has shown pretext because he has presented evidence that Anderson consciously considers race and gender when making employment decisions. Defendants contend that Plaintiff fails to show pretext because he has misconstrued Anderson's testimony; Anderson's testimony, affidavit, and memorandum show that his selection of Maples was not based on race or gender; and statements of a general nature are not evidence of a discriminatory motive.

Maples claims that Anderson is predisposed to reverse discrimination based on his selection of Jenkins as the Deputy Fire Chief. He appears to claim that Joseph Aaron Smith ("Smith"), a white male, should have been selected instead of Jenkins. Smith began working for the City Fire Department in 1973 and retired in 2006 as an Assistant Fire Chief. The Assistant Fire Chief position is the second highest position with the Department, just below the Fire Chief. Smith claims that Jenkins was not as qualified for the job as he was only a Battalion Chief (which is below the position of Assistant Chief) at the time of his selection. See Smith Dep. 1-8. After the selection of Jenkins, Smith met with Anderson. Smith testified that he told Anderson that there was "no way" that Jenkins was more qualified for the job than he (Smith) was to which Anderson allegedly said "You're right, but [Jenkins] brings a unity to the Department." Smith Dep. 9-11. Maples claims that unity is a code word for diversity and is strong evidence that Anderson uses gender and race to make employment decisions.

Maples fails to show pretext based on the selection of Jenkins as Assistant Fire Chief. Bradley denies that his promotion decisions in other matters have been affected by considerations of race and gender. He has provided a list of promotions and reclassifications of Chief Officer ranks during his tenure as Fire Chief. Of the thirty promotions, twenty-four were white males, four were black males, one was a Hispanic male, and one was a female of undesignated race. Anderson Supplemental Aff., Para. 2 and attachment.

Maples also claims that he has shown pretext because Anderson announced to his senior staff in 2003 that the Fire Department needed more diversity in its upper management. Maples Aff., Para. 2. Additionally, he notes that Anderson testified that it was good to consider gender and race when making a decision. Anderson Dep. 35. Review of Anderson's testimony reveals, however, that Anderson stated that he believed in diversity,

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“but certainly not at the expense of good qualifications.” *Id.* Anderson states he believes that a diverse work force enhances the operations of the Fire Department, but he also states that he strongly objects to the use of gender, race, or other factors as substitutes for judging employees on their merits. Anderson Aff., Para. 6.

Although Anderson made comments about diversity, Maples has not shown that Anderson recommended Floyd for the Fire Marshal position because of her race and/or gender. Here, comments about diversity or unity are too general or ambiguous to show discrimination in the decision to select Floyd. *See Spain v. Mecklenburg County Sch. Bd.*, 2002 WL 31856617, *4 (4th Cir.2002) (purported comments by the Superintendent of the Mecklenburg County School Board that she preferred female administrators because they are better organized than men was insufficient to establish pretext in the face of evidence that during the superintendent's administration fourteen of the twenty-four new administrators were men); *Plumb v. Potter*, 212 Fed. Appx. 472 (6th Cir.2007) (comment by employee's supervisor, who was responsible for filling position, that the facility needed more diversity was not evidence of pretext); *Alitizer v. City of Roanoke*, 2003 WL 1456514 (W.D.Va.) (unpublished) (three white police officers alleged that the City of Roanoke promoted a less qualified African-American female to police sergeant ahead of them because of her race. The district court noted that “[Police Chief] Gaskins' concern about the lack of diversity in the Department's ranks is not evidence of discriminatory animus. Nor is the fact that Gaskins thought it important to recruit and prepare minorities for promotion. That evidence says nothing about Gaskins willingness to promote a candidate because that candidate is an African-American.”), *aff'd*, 78 Fed.Appx. 301 (4th Cir.2003).

B. Claims against Anderson in his Individual Capacity

*9 Maples alleges that Anderson, acting under color of state law, violated his constitutional rights and rights under Title VII. He seeks an award of punitive damages. Complaint, Paras. 9 and 18. Anderson contends that he is entitled to summary judgment because Maples cannot establish liability under Title VII and that it follows that Anderson is immune from liability under § 1983 and he is entitled to qualified immunity. Additionally, Anderson argues that Maples fails to show that, in making his recommendation for Fire Marshal, he exercised his discretion in an arbitrary, capricious manner.

Where a § 1983 claim is based upon alleged discrimination, the standards developed in Title VII litigation apply. *Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir.1994); *see also Causey v. Balog*, 162 F.3d 795, 804 (4th Cir.1998) (The elements a plaintiff must prove and the standards applied in assessing a § 1983 gender discrimination claim are the same as in the Title VII context. If a plaintiff fails to establish that defendants violated her rights under Title VII, then her similar claims under § 1983 must also fail). Thus, Defendant Anderson is entitled to summary judgment on the claim asserted against him under § 1983 for the same reason that the City is entitled to summary judgment for the claims asserted against it under Title VII.

Punitive damages are available under § 1983 where a defendant is motivated by an evil intent or shows a reckless or callous indifference to a plaintiff's rights. *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). To sustain a claim for punitive damages under the civil rights statute, a plaintiff can show either malice or “reckless indifference” to his federally protected rights. *See Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 443–45 (4th Cir.2000). Here, Maples has simply not presented any evidence to show callous or reckless indifference or to show malice.

CONCLUSION

Based the foregoing, it is recommended that Defendants' motion for summary judgment (Doc.

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20) be granted.

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APPENDIX C



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C

Only the Westlaw citation is currently available.

United States District Court,
E.D. California.
Eugene KORTE, Plaintiff,
v.
DOLLAR TREE STORES, INC., Defendant.

No. CIV. S-12-541 LKK/EFB.
June 11, 2013.

Robert P. Biegler, Biegler Law Firm, Sacramento,
CA, for Plaintiff.

Lisa Kathleen Horgan, Littler Mendelson, San
Francisco, CA, for Defendant.

ORDER

LAWRENCE K. KARLTON, Senior District Judge.

*1 Plaintiff Eugene Korte sues defendant Dollar Tree Stores, Inc., alleging: (i) failure to comply with wage and hour laws, (ii) failure to provide proper wage statements, (iii) failure to pay wages due at termination, (iv) retaliatory termination, and (v) age discrimination. The first four causes of action are pled under the California Labor Code; the fifth under California's Fair Employment and Housing Act. According to Dollar Tree, Korte "is a discharged member of a decertified class of current and former Dollar Tree employees who worked as Store Managers at California retail store locations between 12/24/2004 and 5/26/2009 and who raised wage and hour claims challenging their exempt classification."^{FN1} (Notice of Removal, ECF No. 1, at 1.)

FN1. The decertification order is available at *Cruz v. Dollar Tree Stores, Inc.*, Nos. 07-2050/07-4012, 2011 WL 2682967, 2011 U.S. Dist. LEXIS 73938 (N.D.Cal. Jul.8, 2011) (Conti, J.).

Korte filed suit in Sacramento County Superior Court on December 8, 2011. The case was removed to this court on February 29, 2012. Dollar Tree now moves for summary judgment, or in the alternative, partial summary judgment.

The motion came on for hearing on May 28, 2013. For the reasons set forth below, the court will grant Dollar Tree partial summary judgment as to certain of Korte's claims.

I. FACTS

The following facts are undisputed or sufficiently uncontroverted.

Korte began working for Dollar Tree in 1999. (Defendant's Statement of Undisputed Facts ("DSUF") 4, ECF No. 34.) From May 10, 2007 until his termination in April 2011, Korte was the Store Manager and/or the Z Manager^{FN2} of at least four different Dollar Tree stores in the Sacramento region. (DSUF 5; Plaintiff's Response to Defendant's Statement of Undisputed Facts ("PR-DSUF") 5, ECF No. 39.) Store Managers, in turn, are supervised by District Managers. (DSUF 1, 2.) Dollar Tree classifies Store Managers and District Managers as exempt from overtime compensation, while Assistant Store Managers and all other retail store employees (termed "Associates," most of whom work part-time schedules) are classified as non-exempt. (DSUF 3.)

FN2. A Z Manager is a Store Manager without a store assignment. (DSUF 4.) The parties do not discuss the differences between these two positions in any detail, and the differences do not appear material to this motion; accordingly, the remainder of this order will simply describe Korte's position with Dollar Tree during the 2007-2011 period as "Store Manager."

A. Store Manager is the highest-level manager at each Dollar Tree location. (DSUF 6.) Korte's

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duties as Store Manager included recruiting, hiring, supervising, evaluating, and disciplining employees; planning staffing and work schedules; ordering merchandise; deciding how to display merchandise (within company guidelines); and training future Store Managers. (DSUF 9–12, 19–20, 25, 28, 34, 40; PR–DSUF 40.) Although he was in charge of his store location, Korte could not make certain decisions, such as adding hours to employees' schedules or discharging employees, without authorization by the District Manager and/or Dollar Tree's Human Resources department. (DSUF 7, 12, 27; PR–DSUF 12, 27.)

Dollar Tree expected Store Managers to spend the majority of their time on management tasks and to delegate non-management tasks. (DSUF 43, 44.) This expectation was communicated to Store Managers in various ways, including performance evaluations, a Store Manager job description, and various documents setting forth company policies and procedures. (DSUF 44.) Korte was aware of Dollar Tree's expectation as to how he should structure his time. (DSUF 43.)

*2 Store Managers were to submit electronic certifications each week confirming that they had spent at least 50% of their time on exempt tasks. (DSUF 96.) If a Store Manager was unable to make this certification, (s)he was required to set out the reasons why (s)he could not do so. (Id.) Korte acknowledges that Dollar Tree never suggested that he should be anything but truthful in filling out the certifications, and he maintains that he was truthful in completing them. (DSUF 98–100.)

Dollar Tree maintains a formal non-discrimination and non-harassment policy ("Policy"). (DSUF 52.) The Policy forbids discrimination and/or harassment on the basis of sex, race, sexual orientation, pregnancy, religion, national origin, age, disability, and any other status protected by law. (DSUF 53.) The Policy specifically prohibits "verbal comments about an individual's body" and "unwelcome physical behavior such as ... touching." (DSUF 54.) The

Policy is found in an employee handbook, which Korte distributed to new employees. (DSUF 52, 55.) Korte also attended at least three company trainings on sexual harassment. (DSUF 61.) Korte understood that the Policy prohibited discrimination and sexual harassment, and that as Store Manager, he was obliged to enforce the Policy. (DSUF 58.)

In 2002, Dollar Tree received reports that Korte had inappropriately touched female employees, including putting an arm around a female associate's shoulders and pulling her towards him to talk to her, as well as pinching another female associate on the arm. Dollar Tree also received a report that Korte had commented on the placement of keys on a necklace in relation to a female employee's breasts. Korte was disciplined by Dollar Tree for this inappropriate behavior. (DSUF 62.) He was also directed to review Dollar Tree's sexual harassment policy and given a written warning that further sexual harassment complaints would result in disciplinary action, up to and including termination. (DSUF 64.)

In August and September 2007, shortly after Korte became Store Manager in Roseville, California, Dollar Tree received reports from several of his female subordinates that he had made inappropriate remarks about their bodies, pinched one female associate's waist, run his finger down the side of another female associate's neck, and touched a third female associate's elbow. (DSUF 67.) After the complaints were investigated by Dollar Tree's Regional Human Resources Manager, Korte's District Manager warned Korte regarding his inappropriate behavior. He was transferred to another store. (DSUF 69.)

In June 2009, Dollar Tree again received a complaint from a female employee regarding inappropriate behavior by Korte. (DSUF 70.) She complained that Korte did several things that made her feel uncomfortable: he invaded her space (despite being informed that she did not like people too close to her), whispered in her ear, followed her when she would try to move away, and told her that

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she “still drive[s][him] crazy.” (DSUF 71.) Korte was again counseled regarding inappropriate behavior and warned to stay away from the associate in question. (DSUF 72.)

*3 In March 2011, Dollar Tree received a Department of Fair Employment and Housing (“DFEH”) Complaint of Discrimination filed by a former employee, Laura Gaines, alleging that Korte had subjected her to sexual harassment. Gaines complained that Korte commented on her appearance inappropriately, told her that she should wear her Dollar Tree apron with nothing underneath, and made inappropriate comments when she would bend over. (DSUF 74.)

After receipt of the DFEH Complaint, Dollar Tree’s Director of Human Resources and its Regional Human Resources Manager met with Korte to discuss Gaines’s sexual harassment allegations. (DSUF 75.) Korte was subsequently suspended; Dollar Tree claims this was due to the DFEH complaint, while Korte contends it was due to age discrimination and retaliation. (DSUF 77; PR–DSUF 76.) Dollar Tree ultimately entered into a monetary settlement with Gaines, which resolved the administrative complaint. (DSUF 79.)

After an investigation was concluded, Korte was terminated on April 18, 2011 for “conduct unbecoming an officer of the Company due to inappropriate behavior,” both based on his conduct towards Gaines and in the context of the history of complaints against him. (DSUF 81.) Korte contends that his termination was due to age discrimination and retaliation. (PR–DSUF 80.)

Dollar Tree moves for summary judgment or partial summary judgment in its favor.

II. STANDARD RE: SUMMARY JUDGMENT

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a); *Ricci v. DeStefano*, 557 U.S. 557, 586, 129 S.Ct.

2658, 174 L.Ed.2d 490 (2009) (it is the movant’s burden “to demonstrate that there is ‘no genuine issue as to any material fact’ and that they are ‘entitled to judgment as a matter of law’ ”); *Walls v. Central Contra Costa Transit Authority*, 653 F.3d 963, 966 (9th Cir.2011) (same).

Consequently, “[s]ummary judgment must be denied” if the court “determines that a ‘genuine dispute as to [a] material fact’ precludes immediate entry of judgment as a matter of law.” *Ortiz v. Jordan*, 562 U.S. —, 131 S.Ct. 884, 891, 178 L.Ed.2d 703 (2011), quoting Fed.R.Civ.P. 56(a); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 942 (9th Cir.2011) (same).

Under summary judgment practice, the moving party bears the initial responsibility of informing the district court of the basis for its motion, and “citing to particular parts of the materials in the record,” Fed.R.Civ.P. 56(c)(1)(A), that show “that a fact cannot be ... disputed.” Fed.R.Civ.P. 56(c)(1); *In re Oracle Corp. Securities Litigation*, 627 F.3d 376, 387 (9th Cir.2010) (“The moving party initially bears the burden of proving the absence of a genuine issue of material fact”) (citing *Celotex v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

A wrinkle arises when the non-moving party will bear the burden of proof at trial. In that case, “the moving party need only prove that there is an absence of evidence to support the nonmoving party’s case.” *Oracle Corp.*, 627 F.3d at 387.

*4 If the moving party meets its initial responsibility, the burden then shifts to the non-moving party to establish the existence of a genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–86, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Oracle Corp.*, 627 F.3d at 387 (where the moving party meets its burden, “the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial”). In doing so,

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the non-moving party may not rely upon the denials of its pleadings, but must tender evidence of specific facts in the form of affidavits and/or other admissible materials in support of its contention that the dispute exists. Fed.R.Civ.P. 56(c)(1) (A).

The court's function on a summary judgment motion is not to make credibility determinations or weigh conflicting evidence with respect to a disputed material fact. *See T.W. Elec. Serv. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987).

"In evaluating the evidence to determine whether there is a genuine issue of fact," the court draws "all reasonable inferences supported by the evidence in favor of the non-moving party." *Walls*, 653 F.3d at 966. Because the court only considers inferences "supported by the evidence," it is the non-moving party's obligation to produce a factual predicate as a basis for such inferences. *See Richards v. Nielsen Freight Lines*, 810 F.2d 898, 902 (9th Cir.1987). The opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts.... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 586-87 (citations omitted).

III. ANALYSIS

A. Request for Judicial Notice

Dollar Tree has requested that the court take judicial notice of six documents filed in support of its motion. (ECF No. 35.) The court will not rule on the request for judicial notice, as it did not rely on these documents in reaching its decision herein.

B. Evidentiary Objections

"In general, only admissible evidence may properly be considered by a trial court in granting summary judgment." *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1335 n. 9 (9th Cir.1980).

Dollar Tree has filed objections to 46 statements in a declaration filed by Korte in support of his opposition to this motion. (ECF No. 45.) The majority of these statements do not bear on the court's decision herein, and therefore Dollar Tree's objections to them need not be addressed. The court need only decide evidentiary objections that are material to its ruling. *Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir.2010). Any pertinent evidentiary objections will be addressed as they arise.

I turn now to the substance of Dollar Tree's motion.

B. Motion for Summary Judgment

As the court is sitting in diversity, it decides this motion under California's substantive law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

1. Was Korte an exempt employee?

*5 The dispositive question as to many of the issues raised in this motion is whether Korte was exempt from California law governing overtime pay, meal periods, rest breaks, itemized wage statements, and waiting time penalties (the latter for wages not paid upon termination). Dollar Tree contends that Korte, as a Store Manager, was exempt from these protections, and that consequently, it should be granted summary judgment on these claims.

a. Standard for exemption

California law requires that all employees receive overtime compensation and authorizes civil actions to recover unpaid overtime. Cal. Lab.Code §§ 510, 1194.

The California Industrial Welfare Commission ("IWC"), a state agency established in 1913, promulgated regulations in the form of "wage orders," which governed employment matters such as maximum hours of work and overtime pay. *Indus. Welfare Comm'n v. Superior Court*, 27 Cal.3d 690, 700, 166 Cal.Rptr. 331, 613 P.2d 579

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(1980); Cal. Lab.Code § 70. “The IWC's wage orders, although at times patterned after federal regulations, also sometimes provide greater protection than is provided under federal law” *Ramirez v. Yosemite Water Co., Inc.*, 20 Cal.4th 785, 795, 85 Cal.Rptr.2d 844, 978 P.2d 2 (1999); 29 U.S.C. § 218(a). In issuing its wage orders, “the IWC acted in a quasi-legislative capacity. Although the IWC was defunded effective July 1, 2004, its wage orders remain in effect.” *Johnson v. Arvin-Edison Water Storage Dist.*, 174 Cal.App.4th 729, 735, 95 Cal.Rptr.3d 53 (2009) (internal citations omitted).

Cal. Lab.Code § 515(a) authorized the IWC to “establish exemptions [subject to certain qualifications] from the requirement that an overtime rate of compensation be paid ... for executive, administrative, and professional employees” As statutory protections for overtime pay are to be liberally construed, any “exemptions from statutory mandatory overtime provisions are narrowly construed.” *Ramirez*, 20 Cal.4th at 794, 85 Cal.Rptr.2d 844, 978 P.2d 2. Application of the exemptions is “limited to those employees plainly and unmistakably within their terms.” *Nordquist v. McGraw-Hill Broad. Co.*, 32 Cal.App.4th 555, 38 Cal.Rptr.2d 221 (1995). Further, “the assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption.” *Ramirez*, 20 Cal.4th at 794–5, 85 Cal.Rptr.2d 844, 978 P.2d 2.

IWC Wage Order No. 7, which regulates wages, hours, and working conditions in California's mercantile industry (and therefore applies to Dollar Tree), exempts from overtime pay requirements “persons employed in administrative, executive, or professional capacities.” Cal.Code Regs. tit. 8, § 11070(1)(A). The executive exemption, at issue in this motion, applies to any employee:

(a) whose duties and responsibilities involve the

management of the enterprise in which he is employed, or of a customarily recognized department or subdivision thereof;

(b) who customarily and regularly directs the work of two or more other employees therein;

*6 (c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight;

(d) who customarily and regularly exercises discretion and independent judgment;

(e) who is primarily engaged in duties which meet the test of the exemption; and

(f) whose monthly salary is equivalent to no less than two times the state minimum wage for full-time employment.

Cal.Code Regs. tit. 8, § 11070(1)(A)(1)(a)-(f).

For our purposes, the critical requirement lies in subsection (e): was Korte “primarily engaged in duties which meet the test of the exemption”? The IWC defines “primarily” as “more than one-half the employee's work time.” IWC Wage Order No. 7–2001, § 2(K). The applicable regulation provides that, in making this determination, “[t]he work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work considered.” Cal.Code Regs. tit. 8, § 11070(1)(A)(1)(e). But courts are not just to make a quantitative evaluation in determining whether the exemption applies. Rather:

A trial court [must inquire] into the *realistic* requirements of the job. In so doing, the court should consider, first and foremost, how the employee actually spends his or her time. But the trial court should also consider whether the employee's practice diverges from the employer's

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realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job.

Ramirez, 20 Cal.4th at 802, 85 Cal.Rptr.2d 844, 978 P.2d 2 (emphasis in original). This test seeks to account for attempts, by either side, to game a purely-quantitative system: the employer who tries to avoid paying overtime "by fashioning an idealized job description [with] little basis in reality", and the employee who falls "below the 50 percent mark due to his own substandard performance." *Id.*

Dollar Tree, as the employer, "bears the burden of proving the employer's exemption." *Id.* at 794-5, 85 Cal.Rptr.2d 844, 978 P.2d 2. And on summary judgment, it "bears the [initial] burden of proving the absence of a genuine issue of material fact" as to the exemption's existence. *Oracle Corp.*, 627 F.3d at 387.

b. Korte's evidence

Whether the executive exemption applies to Korte turns not only on the undisputed facts, but also on statements in Korte's declaration, submitted in opposition to this motion. I have considered Dollar Tree's evidentiary objections to the relevant paragraphs of the declaration, and set forth those statements which appear to be free of appropriate objection:

- While a Store Manager, up until the time of my termination in April 2011, I was required to undertake the freight duties at my store, as I did not have a Freight Manager. (Plaintiff's Declaration in Opposition to Defendant's Motion for Summary Judgment ("Korte Decl.") ¶ 18, ECF No. 38.)

*7 • I requested that a Freight Manager be assigned to my store, or, that I be given the authority to hire a Freight Manager from outside

Dollar Tree. (Korte Decl. ¶ 18.)

- I was instructed by management not to do the freight function, but not provided the means (bodies) to make that happen. (Korte Decl. ¶ 18.)

- I was not able to submit said certification on many, if not most weeks, while I was a Store Manager (2007--2011), because I was doing primarily non-exempt duties. (Korte Decl. ¶ 28.)

- As was noted earlier herein, I did not have a freight manager and thus was required to do the freight duties at my store. (Korte Decl. ¶ 28.)^{FN3}

FN3. As explained, this portion of the opinion deals only with evidentiary objections. Clearly, the plaintiff's assertion of requirement is factually in dispute.

- I also performed many other non-exempt functions, including, but not limited to, stocking shelves, moving merchandise, and checking out customers. (Korte Decl. ¶ 28.)

- I received calls from many in Dollar Tree management, including, but not limited to, Patricia Doss at corporate, a Dollar Tree attorney who described herself as a compliance manager, Market Manager Carlos Hernandez and District Manager Melissa Ruzyla, Sacramento Compliance Manager Julia Giddens, Human Resources Manager for Northern California Candance [*sic*] Camp, all had conversations with me about my non compliance. All expressed concern that I was non compliant. (Korte Decl. ¶ 29.)

- I was never provided with the freight manager. (Korte Decl. ¶ 29.)

c. Dollar Tree's initial showing

Dollar Tree "bears the [initial] burden of proving the absence of a genuine issue of material fact" as to whether Korte is subject to the executive

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exemption. *Oracle Corp.*, 627 F.3d at 387.

Dollar Tree contends that Korte qualified for the executive exemption because it “realistically expected that [he] would be primarily engaged in exempt duties as a store manager.” (Memorandum of Points and Authorities in Support of Motion for Summary Judgment and/or Partial Summary Judgment (“Motion”) 16:21–23, ECF No. 33.) It communicated this expectation to him “both through the certification process and through the inquiries he received when he responded that he was not performing managerial duties over 50% of the time.” (Motion 17:7–10.) When Korte explained that he spent more than 50% of his time on non-managerial duties because he lacked a Freight Manager, Dollar Tree instructed him to train one of his Assistant Store Managers to be the Freight Manager. (Motion 17:11–13.) In light of these facts, according to Dollar Tree, Korte was evading the exemption “by failing to adhere to Dollar Tree’s clearly communicated expectations” and “due to his own substandard performance.” (Motion 17:17–18, 17:23.) The company cites *Ramirez* for the proposition that “an employee who is supposed to be engaged in [exempt] activities during most of his working hours and falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption.” 20 Cal.4th at 802, 85 Cal.Rptr.2d 844, 978 P.2d 2. Dollar Tree’s argument, essentially, is that Korte spent more than 50 percent of his time on non-exempt functions because he failed to meet the company’s realistic expectations for job performance.

*8 These averments, and the evidence proffered in support, are sufficient to meet Dollar Tree’s initial burden on summary judgment.

d. Korte’s demonstration of a genuine issue of material fact

The burden now shifts to Korte, who must now establish that there is a genuine issue of material fact as to whether he was an exempt employee. Korte alleges that, during the relevant weeks, he

was performing primarily non-exempt functions: “I was not able to submit said certification [that I had spent more than 50% of my work time on exempt duties] on many, if not most weeks, while I was a Store Manager (2007–2011), because I was doing primarily nonexempt duties.” (Korte Decl. ¶ 28.) This statement satisfies Korte’s burden as to the quantitative factor under the exemption, *i.e.*, that there were weeks in which he spent more than 50% of his time doing non-exempt work.

What remains is the inquiry prescribed by the California Supreme Court as to “whether the employee’s practice diverges from the employer’s realistic expectations, whether there was any concrete expression of employer displeasure over an employee’s substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job.” *Ramirez*, 20 Cal.4th at 802, 85 Cal.Rptr.2d 844, 978 P.2d 2.

Korte disputes Dollar Tree’s contention that he spent more than 50 percent of his time on non-exempt functions because he failed to meet the company’s realistic expectations for job performance. He argues that “Dollar Tree management’s displeasure with [his] non compliance was not realistic, given the fact [that he] had informed them on multiple occasions of his need for a Freight Manager in order to comply.” (Plaintiff’s Points and Authorities in Opposition to Defendant’s Motion for Summary Judgment (“Opposition”) 5:6–8.) In support, he cites paragraph 18, 28, and 29 of his declaration, which are largely reproduced above under the heading “Korte’s evidence.” But these paragraphs are insufficient to rebut Dollar Tree and create a genuine issue of material fact, as they fail to explain why Korte did not simply train one of his Assistant Store Managers to be a Freight Manager, as Dollar Tree directed.

Nonetheless, Korte’s deposition transcript, relied upon by Dollar Tree, contains the following exchange. The highlighted passages are those cited

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by Dollar Tree in support of its motion:

Q. he instruction from Dollar Tree[,] from Melissa Ruzyllo, your superior, was to train one of your existing assistant store managers to be the freight manager, correct?

A. Yes. And I asked her—

Q. And you resisted that because you didn't think it was possible?

A. No, I did not resist it. I asked her to transfer one of those people out and transfer somebody else in that I could make a freight manager.

Q. You said, "I don't think I can make any of these freight managers," correct? You resisted that direction. Your judgment was they couldn't be freight managers?

**9 A. My judgment was correct.*

(Deposition of Eugene Korte 179:24–180:13, ECF No. 33–6.)

While it is undisputed that Korte “was instructed to train one of his [Assistant Store Managers] to be the Freight Manager” (DUSF 45), here, Korte is claiming that these expectations were unrealistic because, in his judgment, the Assistant Store Managers under his supervision could not fulfill the Freight Manager function. Arguably, his assertion gives rise to a genuine issue of material fact, *i.e.*, whether, in directing Korte to train one of his assistant store managers to perform the freight manager function, Dollar Tree's expectations were “realistic given the actual overall requirements of the job.” *Ramirez*, 20 Cal.4th at 802, 85 Cal.Rptr.2d 844, 978 P.2d 2. Korte was of the view that these expectations were not realistic given his staff's capabilities. Korte's deposition testimony therefore provides “sufficient evidence supporting the claimed factual dispute ... to require a judge or jury to resolve the parties' differing versions of the truth at trial.” *T.W. Elec. Serv.*, 809 F.2d at 630. Accordingly, summary judgment must be denied as

to whether Korte was exempt from California's overtime laws.

Dollar Tree has also moved for summary judgment on Korte's claims for violations of California's meal period, rest break, itemized wage statement, and waiting time statutes, on the grounds that his exempt status moots these claims. As Korte has demonstrated that a genuine dispute exists as to whether he fell under the executive exemption, the court must deny Dollar Tree summary judgment on these claims as well.

2. Can Korte make out a claim for retaliation?

Korte contends that Dollar Tree terminated him in retaliation for his filing of certifications showing that he spent a majority of his time on non-exempt functions, and for his communications with his superiors regarding this fact. Korte argues that, by simultaneously directing him to spend the majority of his time on exempt activities, while failing to provide him with the staff necessary to achieve this goal, Dollar Tree implicitly encouraged him to lie about his duties on his weekly certifications, and thereby participated in a violation of state wage and hour law. (Opposition 7:2–22.)

Korte's retaliation claims are brought under the First Amendment, as well as under Cal. Lab.Code §§ 98.6 and 1102.5.^{FN4} Dollar Tree is granted partial summary judgment on the First Amendment claim, as Korte concedes this point. (Opposition 3:9–10.)

FN4. In his Opposition, Korte argues, in passing, that his retaliation claim is also actionable as a violation of California's public policy, citing *Rojo v. Kliger*, 52 Cal.3d 65, 276 Cal.Rptr. 130, 801 P.2d 373 (1990) (granting leave to amend to plead a cause of action for wrongful discharge in violation of public policy). However, Korte has failed to plead this cause of action in his complaint. Having previously granted him leave to amend (ECF No. 18), the court declines to do so again.

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Dollar Tree raises two lines of defense to Korte's Labor Code claims. First, it contends that they are barred for failure to exhaust administrative remedies, and second, that they are not cognizable under either Labor Code provision cited. Suffice it to say that there is no binding precedent on these questions, and courts remain sharply divided on all of them.^{FN5}

FN5. For opinions holding that plaintiffs need not exhaust administrative remedies before suing under the California Labor Code, see *Creighton v. City of Livingston*, No. CV-F-08-1507-OWWSMS, 2009 WL 3246825, 2009 U.S. Dist. LEXIS 93720 (E.D.Cal. Oct.7, 2009) (Wanger, J.) (“Exhaustion of administrative remedies before the Labor Commissioner before filing suit for statutory violations of the Labor Code is not required under California law”); *Turner v. San Francisco*, 892 F.Supp.2d 1188, 1202 (N.D.Cal.2012) (Chen, J.) (“The Court finds that exhaustion under § 98.7 is not required before bringing a civil action under §§ 98.6 and 1102.5”). For opinions holding otherwise, see *Dolis v. Bleum USA, Inc.*, No. 11-CV-2713-TEH, 2011 WL 4501979, 2011 U.S. Dist. LEXIS 110575 (N.D.Cal. Sep.28, 2011) (Henderson, J.) (barring § 1102.5(c) claim for failure to exhaust administrative remedies with the Labor Commissioner); *Ferretti v. Pfizer Inc.*, 855 F.Supp.2d 1017, 1024 (N.D.Cal.2012) (Koh, J.) (same).

For opinions holding that the California Labor Code does not provide a right of action to employees who allege retaliation after complaining to their private-sector employers, see *Hollie v. Concentra Health Servs., Inc.*, No. C 10-5197-PIH, 2012 WL 993522, 2012 U.S. Dist. LEXIS 40203 (N.D.Cal. Mar.23, 2012) (Hamilton, J.) (“[T]he

court finds as a matter of law that neither the verbal/e-mail protests, nor the protests ‘by conduct,’ were activities protected under § 98.6 ”); *Weingand v. Harland Fin. Solutions*, No. C-11-3109-EMC, 2012 WL 3537035, 2012 U.S. Dist. LEXIS 114651 (N.D.Cal. Aug.14, 2012) (Chen, J.) (dismissing § 98.6 retaliation claim where “[p]laintiff merely allege[d] that he complained of his employer’s conduct within the company itself”). For an opinion holding otherwise, see *Muniz v. United Parcel Serv., Inc.*, 731 F.Supp.2d 961, 970 (N.D.Cal.2010) (Wilken, J.) (holding that refusal to accede to employer’s alleged practice of hiding wage-and-hour violations could give rise to a claim under § 98.6).

Nevertheless, even if Korte can clear these hurdles, Dollar Tree must still be granted summary judgment on the retaliation claims.

*10 In addressing claims of employer retaliation, California courts apply the burden-shifting approach articulated by the U.S. Supreme Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). In order to establish a prima facie case, the plaintiff employee must demonstrate that: 1) the employee engaged in protected activity; 2) the employer subjected the employee to an adverse employment action; and 3) there was a causal link between the protected activity and the adverse employment action. *Muniz v. United Parcel Service, Inc.*, 731 F.Supp.2d 961, 969 (N.D.Cal.2010) (Wilken, J.). Once the plaintiff has established a prima facie case, the defendant employer is required to offer a legitimate, non-discriminatory reason for the adverse employment action. *Patten v. Grant Joint Union High School Dist.*, 134 Cal.App.4th 1378, 1384, 37 Cal.Rptr.3d 113 (2005). The burden then shifts back to the plaintiff to show that the explanation given by the

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employer for the adverse employment action is “mere pretext.” *Id.*

The critical factor, in the court's view, is whether Korte can make out a prima facie case for causation. The record does not reveal any direct evidence of a causal link between Korte's failure to certify that he was spending the majority of his time on exempt tasks, and his subsequent termination. And while causation may be inferred from temporal proximity, “[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be ‘very close.’” *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001).

What the record demonstrates is that Korte spent years filing certifications of his non-exempt status and discussing the issue with management, all without being subjected to adverse action. His declaration provides, “I was not able to submit said certification on many, if not most weeks, while I was a Store Manager (2007–2011), because I was doing primarily non-exempt duties ... [F]or much of the relevant period, up to the time of my termination in April 2011, I did not have a freight manager and thus was required to do the freight duties at my store.” (Korte Decl. ¶ 28.) While he communicated with numerous superiors regarding the certification issue, there is no evidence that, as April 2011 approached, these communications grew more frequent or that he was given warnings of any kind. Rather, matters seem to have continued apace.^{FN6} Accordingly, the court cannot infer causation based on temporal proximity.

FN6. For example, Dollar Tree has submitted Korte's performance evaluation for 2009/2010. Korte received the following comments in the area of Personnel Management:

[Korte] currently has 3 [Assistant Store Managers] under his management, yet he has not trained any of the three to be a Merchandise Manager. Instead of doing so, he continues to manage the freight processing procedures himself. To alleviate undo [*sic*] pressure to conduct Store Manager functions in conjunction with the freight processing, I would like to see [Korte] give ownership of the Merchandise Manager to one of his ASM's and train them appropriately. (Exhibit I to Declaration of David McDearmon in Support of Motion for Summary Judgment, ECF No. 33–3.)

The signatures of Korte's managers on this document are dated June 7, 2010. The court cannot infer causation from a subjunctive statement (“I would like to see ...”) made some ten months before Korte's termination.

What did change in April 2011 was that Dollar Tree entered into a monetary settlement with a former employee whom Korte was alleged to have harassed and who had filed a DFEH complaint about his behavior. Korte had been the subject of sexual harassment complaints for going on nine years, but it appears that this was the first time the company incurred any financial liability as a result of his conduct. Korte was terminated that same month. Korte's termination appears causally linked to this incident, rather than to the certifications he had been filing for four years.

*11 As Dollar Tree has shown “an absence of evidence to support [Korte's] case” for retaliatory termination, based on lack of evidence of causation, the burden now shifts to Korte to “designate specific facts demonstrating the existence of genuine issues for trial.” *Oracle Corp.*, 627 F.3d at 387. This he fails to do. While Korte argues that he was suspended and then terminated for retaliatory reasons, he has not introduced a single fact to support that position. He does allege that the DFEH

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sexual harassment complaint had “no merit,” that he “was informed, by Dollar Tree management and counsel, that they also felt [the] claims to be without merit,” and that the matter “was ultimately settled for what was termed by Dollar Tree management and counsel as ‘nuisance value.’ ” (Korte Decl. ¶ 23.) But none of this demonstrates that his termination was the result of repeatedly certifying that the majority of his work hours were spent on non-exempt functions. His statement that “I believe that Dollar Tree terminated me because I would not ‘certify’ that I was performing exempt functions for over 50% of my work day” (id.) is conclusory and has no evidentiary weight. Nor can the court infer that Korte suffered a retaliatory termination, for Korte has failed to produce a factual predicate on which to base for such an inference. *See Richards*, 810 F.2d at 902.

In short, the record, taken as a whole, could not “lead a rational trier of fact to find for” Korte. *Matsushita*, 475 U.S. at 586–87. Summary judgment will therefore be entered for Dollar Tree on the retaliation claim.

3. Can Korte seek punitive damages in this lawsuit?

Partial summary judgment must also be entered on Korte's prayer for punitive damages, as the prayer is derivative of his retaliation claim. (First Amended Complaint 8, ECF No. 19.)

3. Has Korte made out a claim for age discrimination?

Korte contends that Dollar Tree unlawfully terminated him due to his age. The California Fair Employment and Housing Act (“FEHA”) outlaws employment discrimination against individuals over forty. Cal. Gov't Code §§ 12926(b), 12940. “California has adopted the three-stage [*McDonnell Douglas*] burden-shifting test established by the United States Supreme Court for trying claims of discrimination, including age discrimination, based on a theory of disparate treatment.” *Guz v. Bechtel National, Inc.*, 24 Cal.4th 317, 354, 100 Cal.Rptr.2d 352, 8 P.3d 1089 (2000). Under this test:

A plaintiff must first establish a prima facie case of discrimination. If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate a legitimate non-discriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for a discriminatory motive.

Llamas v. Butte Cmty. Coll. Dist., 238 F.3d 1123, 1126 (9th Cir.2001).

*12 At trial, Korte would bear the burden of proof to show age discrimination. Accordingly, at summary judgment, Dollar Tree “need only prove that there is an absence of evidence to support [Korte's claim].” *Oracle Corp.*, 627 F.3d at 387. To achieve this, Dollar Tree may show “either that (1) plaintiff could not establish one of the elements of the FEHA claim or (2) there was a legitimate, nondiscriminatory reason for its decision to terminate plaintiff's employment.” *Dep't of Fair Emp't and Hous. v. Lucent Technologies*, 642 F.3d 728, 745 (9th Cir.2011) (internal citations and brackets omitted).

To prove his FEHA claim, Korte must demonstrate that (1) he suffered an adverse employment action, such as termination; (2) at the time of the adverse action, he was over the age of 40; (3) at such time, he was performing his job competently; and (4) some other circumstance suggests discriminatory motive. *See Guz*, 24 Cal.4th at 355, 100 Cal.Rptr.2d 352, 8 P.3d 1089. “While the plaintiff's prima facie burden is not onerous, he must at least show actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a prohibited discriminatory criterion.” *Id.* (internal citations and quotations omitted).

There appears little question that the first two elements are satisfied: Korte was terminated on April 18, 2011, at the age of 58. (DUSF 83.)

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Korte next claims that he was performing his job competently at the time he was terminated. His declaration provides:

I always performed my job duties in an exemplary manner. This is confirmed in my evaluations which were always between "meets expectations" and "exceeds expectations." I did not receive any evaluations which were "below expectations" and/or "needs improvement." This was true even in those years when a sexual harassment claim had been made. (Korte Decl. ¶ 30.)

On this basis, he argues that "[t]here are no facts which indicate that Korte did not perform his job function adequately or that Dollar Tree did not consider Korte to be performing his job function adequately." (Opposition 5.)

Dollar Tree's evidentiary objections to Korte's statement are not well taken. It is true that, taken alone, the assertion "I always performed my job duties in an exemplary manner" would be conclusory and therefore insufficient to support Korte's opposition. *Angel v. Seattle-First Nat. Bank*, 653 F.2d 1293, 1299. But Korte bases his assertion (writing "This is confirmed ...") on the statements in his evaluations; these statements are non-hearsay, as they were both made by and offered against Dollar Tree. Fed.R.Evid. 801(d) (2). Dollar Tree's objection on best evidence rule grounds, Fed.R.Evid. 1002, also fails because "an event may be proved by nondocumentary evidence"—in this case, Korte's perceptions—"even though a written record of it was made." Advisory Committee's Notes on Fed.R.Evid. 1002 (1972). Finally, Korte's statement is relevant, as it makes his assertion of competence more probably than it would otherwise be, and competence is a necessary element of his prima facie case under FEHA.

*13 The question then becomes whether Korte can be said to have made out a prima facie case that he was performing his job duties competently when

he was terminated, given that he had been repeatedly disciplined for violations of Dollar Tree's sexual harassment policy, and, according to Dollar Tree, he was terminated over the final incident of harassment.

Let us assume, *arguendo*, that Korte has made out a prima facie case on this element.

Nevertheless, he cannot establish the final element of his case, that some other circumstance suggests he was discriminated against based on his age.

In his declaration, Korte identifies the following statements made by Dollar Tree management that he claims demonstrate bias against older workers:

- a. Regional Director Cindy Ray, referring to a Dollar Tree employee, stated he was "old thinking" with "old habits" and was "too old, too stupid and missed too much time."
- b. District Manager Paul Massey stated, in 2007, regarding 2 store managers, Connie Vischer and Jerry Littell, that they had "been around forever", that they were old and too stupid to run the business and needed to go.
- c. Market Manager Carlos Hernandez said concerning Jerry Littell in December 2010, "why can't people get this done ... Are they too stupid or too old to comply?"
- d. Regional Director Matt Rodriguez said of employee Jim Wackford that Wackford had to go as he was "too old and stupid" to change his ways.
- e. Zone Manager Jim Dunaway said of Wackford that he was "too old school" and "not going to change."
- f. Regional Manager Rodriguez said of District Manager Spuinuzzi that he had "a 99 cent store mentality", that he was "too old and stupid to

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change to the ways of Dollar Tree.”

g. Market Manager Hernandez said of Store Manager Connie Vischer that she would not be returning to her earlier training duties and would be “better off just retiring.” (Korte Decl. ¶ 38.)

In the context of employment discrimination suits, such statements are termed “stray remarks,” *i.e.*, “statements by nondecisionmakers, or statements by decisionmakers unrelated to the decision process itself.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Under federal antidiscrimination law, such remarks are largely deemed irrelevant, and their assertion is insufficient to withstand summary judgment. *Reid v. Google, Inc.*, 50 Cal.4th 512, 536–7, 113 Cal.Rptr.3d 327, 235 P.3d 988 (2010) (summarizing cases). California, by contrast, takes a “totality of the circumstances” approach to stray remarks: in evaluating FEHA claims, courts should consider stray remarks along with all of the other evidence in the record to determine whether the remarks “create an ensemble that is sufficient to defeat summary judgment.” *Id.* at 539, 541, 542, 113 Cal.Rptr.3d 327, 235 P.3d 988 (internal quotation and citation omitted). For example, in *Reid*, an age discrimination case, the plaintiff survived summary judgment because his evidence of stray remarks was accompanied by incriminating emails, statistical evidence of discrimination by the employer, the plaintiff’s demotion to a nonviable position before termination, and evidence of changed rationales by the employer for the plaintiff’s termination. *Id.* at 545, 113 Cal.Rptr.3d 327, 235 P.3d 988. Moreover, many of the stray remarks in *Reid* concerned the plaintiff personally. *Id.* at 536, 113 Cal.Rptr.3d 327, 235 P.3d 988.

*14 By contrast, Korte has nothing beyond the stray remarks (none of which concern him) to buttress his allegations of age discrimination. His only other allegation concerning age discrimination reads, “I do not believe th[e] Gaines complaint had anything to do with my termination. I believe I was

terminated because of my age.” (Korte Decl. ¶ 23). This statement is conclusory and lacks any evidentiary foundation. Korte provides no evidence to demonstrate that age played a role in his termination other than the stray remarks listed above. As such, his statement is inadmissible under Fed.R.Evid. 602.

Korte does argue that “[t]he [Gaines] matter was ultimately settled for what was termed by Dollar Tree management and counsel as ‘nuisance value’ ” and “[n]o one from Dollar Tree ever told me that they believed Ms. Gaines [*sic*] claims to be credible and/or with merit,” (Korte Decl. ¶ 23). Nonetheless, he proffers no evidence “from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a prohibited discriminatory criterion.” *Guz*, 24 Cal.4th at 355, 100 Cal.Rptr.2d 352, 8 P.3d 1089.

In sum, even when considered with the other evidence presented by Korte, the stray remarks he documents are insufficient to make out a *prima facie* case that age discrimination played a role in his termination.

Accordingly, Dollar Tree is granted partial summary judgment on Korte’s claim of age discrimination under FEHA.

D. Request to Seal

Pursuant to Local Rule 141, Dollar Tree requests that the court seal more than two dozen documents filed in support of this motion. (Notice of Request to Seal, ECF No. 32.) It also moves to seal two lines in its Memorandum of Points and Authorities, two undisputed facts, and two paragraphs of a supporting declaration. (*Id.*)

Korte does not oppose the sealing request. Nevertheless, Dollar Tree bears the burden of demonstrating that the requested sealing order should issue.

1. Standard re: Sealing of Records

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Courts have long recognized a “general right to inspect and copy public records and documents, including judicial records and documents.” *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). “Unless a particular court record is one ‘traditionally kept secret,’ a ‘strong presumption in favor of access’ is the starting point.” *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir.2006) (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir.2003)). In order to overcome this strong presumption, a party seeking to seal a judicial record must articulate justifications for sealing that outweigh the historical right of access and the public policies favoring disclosure. *See id.* at 1178–79.

The Ninth Circuit has determined that the public's interest in non-dispositive motions is relatively lower than its interest in trial or a dispositive motion. Accordingly, a party seeking to seal a document attached to a non-dispositive motion need only demonstrate “good cause” to justify sealing. *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 678 (9th Cir.2010) (applying “good cause” standard to all non-dispositive motions because such motions “are often unrelated, or only tangentially related, to the underlying cause of action”) (internal quotation marks and citation omitted).

*15 Conversely, “the resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in ensuring the ‘public's understanding of the judicial process and of significant public events.’ ” *Kamakana*, 447 F.3d at 1179 (quoting *Valley Broad. Co. v. U.S. Dist. Court for Dist. of Nev.*, 798 F.2d 1289, 1294 (9th Cir.1986)). Accordingly, a party seeking to seal a judicial record attached to a dispositive motion or one that is presented at trial must articulate “compelling reasons” in favor of sealing. *See id.* at 1178. “The mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will

not, without more, compel the court to seal its records.” *Id.* at 1179 (citing *Foltz*, 331 F.3d at 1136). “In general, ‘compelling reasons’ ... exist when such ‘court files might have become a vehicle for improper purposes,’ such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets.” *Id.* (citing *Nixon*, 435 U.S. at 598).

Under the “compelling reasons” standard, a district court must weigh “relevant factors,” base its decision “on a compelling reason,” and “articulate the factual basis for its ruling, without relying on hypothesis or conjecture.” *Pintos*, 605 F.3d at 679 (quoting *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir.1995)). “[S]ources of business information that might harm a litigant's competitive standing” often warrant protection under seal. *Nixon*, 435 U.S. at 598. But “the party seeking protection bears the burden of showing specific prejudice or harm will result if no [protection] is granted.” *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1210–11 (9th Cir.2002). Consequently, that party must make a “particularized showing of good cause with respect to any individual document.” *San Jose Mercury News, Inc. v. U.S. Dist. Court, N. Dist. (San Jose)*, 187 F.3d 1096, 1103 (9th Cir.1999). “Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning” are insufficient. *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir.1992) (quoting *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3rd Cir.1986)).

2. Dollar Tree's boilerplate justifications for sealing

With respect to most of the documents and information it seeks to seal, Dollar Tree has completely failed to make any “showing [of] specific prejudice or harm,” *Phillips*, 307 F.3d at 1210–11, or a “particularized showing of good cause,” *San Jose Mercury News*, 187 F.3d at 1103.

Much of Dollar Tree's Request to Seal repeats the following boilerplate:

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[The document] ... contains confidential and proprietary information regarding Dollar Tree's [BOILERPLATE 1]. In the highly competitive retail industry, the confidentiality of information that relates to Dollar Tree's [BOILERPLATE 2] is critical to maximize the company's competitive advantage. Disclosure of such information would be detrimental to Dollar Tree's financial and competitive interests. Cal. Civ.Code §§ 3426.1; 3426.5.^{FN7} Dollar Tree's request to seal these exhibits is narrowly tailored given that the exhibit cannot be redacted in a meaningful way, and no less restrictive means exist to achieve the overriding interest in protecting the confidentiality of the information.

FN7. Cal. Civ.Code § 3426.1 defines various terms, including "trade secret," under California's implementation of the Uniform Trade Secrets Act. Cal. Civ.Code § 3426.5 directs courts to "preserve the secrecy of an alleged trade secret by reasonable means"

*16 In place of [BOILERPLATE 1], Dollar Tree uses one or more of the following phrases: "business model"; "human resources policies"; "human resources practices"; "operational policies"; "operational procedures"; "ordering processes"; "pay practices"; and "store budgets." In place of [BOILERPLATE 2], Dollar Tree deploys one or more of the following phrases: "compensation structure"; "human resources policies"; "human resources practices"; "operational procedures"; "proprietary business model"; and "proprietary operational procedures." (The supporting Declaration of Lisa K. Horgan is similarly robotic.) As a result, the court determines that defendant has failed to articulate a factual basis for sealing the requested documents unless the court relies on hypothesis or conjecture—which it declines to do. *Pintos*, 605 F.3d at 679

As a result, the court finds that Dollar Tree has simply failed to demonstrate a compelling reason to

seal the following: Exhibits A, B, C, D, E, F, G, H, I, J, and L to the Declaration of David McDearmon in Support of Motion for Summary Judgment ("McDearmon Declaration"), ECF No. 33-3), Exhibits D, O, P, Q, R, U, V, and W to the Declaration of Maureen McClain in Support of Motion for Summary Judgment ("McClain Declaration"), ECF No. 33-6), and paragraphs 5 & 6 of the Declaration of Jeff Whitemore in Support of Motion for Summary Judgment ("Whitemore Declaration"), ECF No. 33-4).

Dollar Tree also seeks to justify redaction (rather than wholesale sealing) of certain documents using nearly identical boilerplate. Accordingly, the court finds that Dollar Tree has failed to demonstrate good cause for redacting the following: Exhibits L, M, N to the McClain Decl., lines 5:26 and 17:27-18:1 of the Memorandum of Points and Authorities in Support of Motion for Summary Judgment (ECF No. 33), and undisputed facts nos. 50 & 51 (ECF No. 34).

3. Third-party employees' personal information

What remains are documents that, to one degree or another, contain information identifying individuals who are not parties to this lawsuit. Some of this is personal information (such as names, dates of birth, and signatures) that obviously increases individuals' risk of identity theft; sealing or redaction is obviously warranted, as this information has no relevance to the outcome of this lawsuit. Many other documents concern Dollar Tree employees' allegations of sexual harassment. This information is obviously relevant to a number of Dollar Tree's defenses, which weighs in favor of unsealing; yet the court is also sensitive to the fact that employees who report sexual harassment in the workplace (in and of itself a courageous act, in the court's view), yet do not commence legal proceedings, surely do not intend their complaints to become public knowledge. With these considerations in mind, each of the documents Dollar Tree seeks to seal are now considered in turn.

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Exhibit A to the Declaration of Candace Camp in Support of Motion for Summary Judgment ("Camp Declaration", ECF No. 33-2) consists of emails that include some discussion of an employee's medical conditions. Dollar Tree seeks to seal the entire exhibit, on the grounds that "[t]he individual's circumstances are discussed in detail, making it easy to identify the individual even if the name is redacted." This concern for the employee's privacy rights is warranted. However, portions of the email are relevant to Korte's contention that he could not train his employees to perform certain non-exempt functions. An appropriate compromise is redaction of the employee's name, the dates of the employee's medical appointments, and the two medical conditions referenced.

*17 Exhibits B, D, and E to the Camp Declaration contain handwritten notes about employees' complaints regarding Korte's alleged sexual harassment. Exhibits C and F to the Camp Declaration are statements made by employees about their interactions with Korte. While Dollar Tree seeks to seal these exhibits in their entirety, the court finds that this solution is overbroad, given that there appears to be no personal identifying information about the employees beyond their names, and in one instance, in Exhibit B, an employee's phone number. Accordingly, these exhibits should be filed with employees' names (other than Korte's) and any phone numbers redacted.

Exhibit A to the Whitemore Declaration contains twenty-four employees' names, dates of hire, dates of birth, store assignments, and titles. Dollar Tree seeks to seal this exhibit in its entirety. Sealing, rather than redaction, appears appropriate, for if all identifying information were redacted, this document would convey virtually no information to the reader.

Exhibits H and I to the McClain Declaration are sign-in sheets from Dollar Tree's District Manager and Store Manager Sexual Harassment Trainings. This document may be filed with all

employees' names and signatures, other than Korte's, redacted.

Exhibit K to the McClain Declaration is a statement by an employee detailing Korte's alleged sexual harassment of her. It contains numerous identifying details about the employee, and as such, may be filed under seal.

Exhibit S to the McClain Declaration is an employee's performance review, and Exhibit T thereto is an email discussing an employee's management training. In each instance, Dollar Tree seeks only to redact the individual employee's name. Such redaction is narrowly-tailored and appropriate under the circumstances.

Note that if, during future proceedings herein, either party introduces the redacted or sealed information into evidence, the court is likely to revisit this order and direct that the relevant records be filed in unredacted or unsealed form.

IV. CONCLUSION

The court orders as follows:

[1] Defendant's motion for summary judgment is DENIED.

[2] Defendant's motion for partial summary judgment is DENIED as to plaintiff's claims for overtime compensation, compensation for meal and rest breaks, failure to provide itemized wage statements, and waiting time penalties.

[3] Defendant's motion for partial summary judgment is GRANTED as to plaintiff's claims for retaliation under the First Amendment, retaliation under Cal. Lab.Code §§ 98.6 and 1102.5, age discrimination under the California Fair Employment and Housing Act, and as to plaintiff's prayer for punitive damages.

[4] Defendants are DIRECTED to file Exhibits A-F to the Camp Declaration, and Exhibits H, I, S, and T to the McClain Declaration, each redacted according to the instructions above, no

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more than seven (7) days after entry of this order.

[5] Defendants are DIRECTED to file under seal Exhibit A to the Whitemore Declaration and Exhibit K to the McClain Declaration no more than seven (7) days after entry of this order.

*18 [6] As to all other documents that defendant sought to file under seal or in redacted form, defendant's request is DENIED. Defendant is to file unsealed and unredacted versions of these documents no more than seven (7) days after entry of this order.

IT IS SO ORDERED.

E.D.Cal., 2013.
Korte v. Dollar Tree Stores, Inc.
Slip Copy, 2013 WL 2604472 (E.D.Cal.)

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APPENDIX D



Not Reported in F.Supp.2d, 2008 WL 763745 (W.D.Pa.)
(Cite as: 2008 WL 763745 (W.D.Pa.))

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Only the Westlaw citation is currently available.

United States District Court,
W.D. Pennsylvania.
Jeffrey M. OPSATNIK, Plaintiff,
v.
NORFOLK SOUTHERN CORP., et al., Defendants.

Civil Action No. 06-81.
March 20, 2008.

Lois E. Glanby, McMurray, PA, Robert M. Owsiany, Law Offices of Lois E. Glanby, Pittsburgh, PA, for Plaintiff.

Thomas H. May, Dickie, McCamey & Chilcote, Joseph J. Pass, Robert A. Eberle, Jubelirer, Pass & Intrieri, Pittsburgh, PA, Thomas A. Shumaker, II, Norfolk Southern Corporation Law Department, Norfolk, VA, Richard S. Edelman, O'Donnell, Schwartz & Anderson, Washington, DC, for Defendants.

OPINION AND ORDER OF COURT

AMBROSE, Chief Judge.

*1 Plaintiff, Jeffrey M. Opsatnik ("Plaintiff" or "Opsatnik"), initiated this action against his former employer, Defendant Norfolk Southern Corporation ("NSR"), and his former union, Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference of the International Brotherhood of Teamsters, and Brotherhood of Locomotive Engineers and Trainmen Local Division No. 590 ("BLET") (collectively "Defendants"), alleging discriminatory treatment on the basis of race, sex, and age in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), and the Pennsylvania Human Relations Act, 43 P.S. § 951, *et seq.* ("PHRA").

Pending before the Court are two motions for summary judgment filed by Defendants BLET and Norfolk Southern Corporation, respectively. (Docket Nos. 42, 43). Each Defendant seeks dismissal of Plaintiff's claims against it in their entirety. Plaintiff opposes both Motions. (Docket Nos. 69, 70). After careful consideration of the parties' submissions and for the reasons set forth below, Defendants' motions are granted.

I. INTRODUCTION

A. Factual Background

Unless otherwise indicated, the following material facts are undisputed.

1. General Background

Plaintiff Opsatnik is a Caucasian male born on October 15, 1959. Plaintiff began his railroad employment when he was hired by Consolidated Rail Corporation ("Conrail") on August 22, 1994. Plaintiff became an employee of NSR on June 1, 1999 after NSR acquired Conrail's assets. During all relevant times, NSR was organized into 11 operational divisions, each of which was headed by a Division Superintendent. Plaintiff worked as a locomotive engineer in NSR's Pittsburgh division from June 1, 1999 until his employment was terminated.

Upon joining NSR in June 1999, Plaintiff changed his union affiliation and became a member of BLET. BLET is the collective bargaining representative of locomotive engineers employed by NSR. The Railway Labor Act ("RLA") and the applicable collective bargaining agreement between NSR and BLET set forth detailed procedures for opposing discipline and provide employees several procedural safeguards to protect against arbitrary, excessive, or unfair discipline, including the right to appeal discipline to a Labor Arbitration Board such as a Public Law Board. One part of the collective bargaining agreement negotiated by the parties effective January 1, 2000, is the "START policy," an acronym for System Teamwork and

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Responsibility Training policy. *See* NSR's App'x (Docket No. 44) Exs. 3-4.

2. Plaintiff's Disciplinary Record at NSR

Plaintiff was disciplined five times between April 24, 2001 and the termination of his NSR employment in September 2004. On April 24, 2001, Plaintiff received a 10-day deferred suspension for failure to take calls on March 28 and 29, 2001, and for attempting to persuade the crew caller to falsify records. Plaintiff states that this was a minor violation under the START policy. Plaintiff signed a waiver accepting responsibility in connection with these violations. NSR's App'x, Ex. 5. On October 15, 2001, Plaintiff was counseled for a START violation for making an unauthorized shove move without permission. Plaintiff states that this, too, was only a minor START violation. On December 13, 2002, a 30-day deferred suspension was imposed on Plaintiff for operating his train in excess of the authorized speed in Conway Yard. In connection with this violation, Plaintiff signed a waiver, waiving his right to a formal hearing and accepting responsibility for the violation. *Id.*, Ex. 6. Plaintiff states that he signed the waiver on BLET's advice. He also states that the violation was serious, not major, and was not the equivalent of "excessive speeding." On December 23, 2002, a 30-day deferred suspension was imposed on Plaintiff for failing to properly report a personal injury which occurred on October 27, 2002. Plaintiff appealed this suspension to the Special Board of Adjustment No. 1063, which, on July 29, 2004, rendered a decision upholding the suspension. *Id.*, Ex. 7.

3. Plaintiff's Final Discipline And Termination From Employment

*2 Plaintiff's fifth discipline, and the discipline that gives rise to this litigation, occurred when Plaintiff failed to comply with verbal instructions from a dispatcher with regard to weather-related speed restrictions during the operation of a train. Specifically, on September 8, 2004, Plaintiff was the engineer on an NSR "key" train (i.e., a train transporting hazardous materials). Plaintiff was

accompanied on the trip by conductor Randy Zam. The normal speed limit for the train was 50 miles per hour. The train dispatcher in the area in which Plaintiff's train was operating, however, issued an area-wide speed limit directive, reducing all trains in the area to a maximum speed of 40 miles per hour. The reason for the speed limitation was that heavy storms were expected in the area. Upon the train's return to Conway Yard, it was discovered that Plaintiff and Zam's locomotive had not been properly secured.^{FN1} As a result, NSR pulled and reviewed the train's event recorder which revealed that the train had exceeded the 40-mile per hour speed restriction eight times, including two instances where the train exceeded the normal track authorized speed of 50 miles per hour. Although Plaintiff offered explanations for his conduct, he admitted that he did not heed the reduced-speed directive.^{FN2} As a result of Plaintiff's actions on September 8, 2004, NSR charged him with failure to properly secure a locomotive, improper train handling, and excessive speeding.

FN1. Plaintiff claims that Zam failed to properly secure the locomotive.

FN2. Among other things, Plaintiff explained to the local chairman of BLET Local 590, Robert Salyers, that he maintained normal track authorized speed rather than following the directive because his conductor (Zam) approved, and that he did not want to "outlaw" his train, i.e., have the train re-crewed because he had exceeded his permissible hours of service. Plaintiff also noted that the train arrived safely in Conway Yard and there were no adverse consequences to his actions.

On September 21, 2004, a formal hearing pursuant to the collective bargaining agreement was held on Plaintiff's dismissal for excessive speeding before hearing officer Neville Wilson, an African-American NSR employee. At the time of the hearing, Wilson was terminal superintendent for the Conway Yard. At times during the hearing, Wilson

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noted Plaintiff's irresponsible attitude and that Plaintiff appeared to be sleeping. As a result of the hearing testimony, documentary evidence, and Plaintiff's prior record, Wilson found Plaintiff responsible for all violations with which he was charged and dismissed Plaintiff from service in all capacities.^{FN3}

FN3. Conductor Zam, also a Caucasian male, was suspended, but not discharged for his role in the September 8, 2004 incident.

Pursuant to the collective bargaining agreement and the RLA, Plaintiff's union representative, Robert Salyers, appealed Plaintiff's dismissal to Mark Hamilton, Superintendent of NSR's Pittsburgh Division. Hamilton independently reviewed the September 21, 2004 hearing transcript and all related exhibits, and issued a letter denying the appeal. The BLET then appealed the dismissal to the Special Board of Adjustment, arguing, *inter alia*, that the penalty of removal was excessive and should be reduced. In an Award dated March 30, 2005, the Special Board of Adjustment denied the appeal and upheld Plaintiff's dismissal.

Plaintiff has never denied that he was advised of the speed restriction by the dispatcher or that he committed the speeding infractions with which he was charged. He argues, however, that NSR disciplined him more harshly than it disciplined African-American, female, and/or younger employees for similar infractions in violation of Title VII, the ADEA, and/or the PHRA. Plaintiff also argues that BLET acquiesced to this harsher discipline in violation of the same statutes. Defendants dispute Plaintiff's claims and seek summary judgment in their favor on all counts of Plaintiff's Complaint.

B. Procedural History

*3 On January 19, 2006, Plaintiff filed a Complaint against Defendants. (Docket No. 1). On March 10, 2006, Defendant NSR filed its Answer to Plaintiff's Complaint. (Docket No. 5). The BLET

Defendants filed their Answer to the Complaint on March 15, 2006. (Docket No. 6). On June 4, 2007, Defendants filed the instant Motions for Summary Judgment and supporting materials. (Docket Nos. 42-45, 48-52). Plaintiff filed a Responsive Statement of Material Facts, Exhibits, and a Brief in Opposition to each Defendant's Motion. (Docket Nos. 59, 61-62, 69-70). Both Defendants filed Responses to Plaintiff's Statement of Additional Facts and Reply Briefs to Plaintiff's Opposition. (Docket Nos. 68, 72-74). Defendant NSR also filed supplemental exhibits to its Motion. (Docket Nos. 71, 77). Both Motions are now ripe for my review.

II. LEGAL ANALYSIS

A. Standard of Review

Summary judgment may only be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In considering a motion for summary judgment, this Court must examine the facts in a light most favorable to the party opposing the motion. *Int'l Raw Materials, Ltd. v. Stauffer Chem. Co.*, 898 F.2d 946, 949 (3d Cir.1990). The burden is on the moving party to demonstrate that the evidence creates no genuine issue of material fact. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.1987). The dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is material when it might affect the outcome of the suit under

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the governing law. *Id.* Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial. *Celotex*, 477 U.S. at 322. Once the moving party satisfies its burden, the burden shifts to the non-moving party, who must go beyond its pleadings, and designate specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories showing that there is a genuine issue for trial. *Id.* at 324. Summary judgment must therefore be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *White v. Westinghouse Elec. Co.*, 862 F.2d 56, 59 (3d Cir.1988) (quoting *Celotex*, 477 U.S. at 322).

B. Plaintiff's Claims Against NSR

1. "Reverse" Race and Gender Discrimination- Title VII and PHRA^{FN4}

FN4. My analysis of Plaintiff's ADEA and Title VII claims applies equally to his age, race, and gender discrimination claims under the PHRA. *Kelly v. Drexel Univ.*, 94 F.3d 102, 105 (3d Cir.1996).

*4 NSR alleges that it is entitled to summary judgment as to Plaintiff's "reverse" race and gender discrimination claims because Plaintiff cannot establish a *prima facie* case of discrimination and/or there is no genuine issue of material fact that NSR's reason was a pretext for discrimination. Plaintiff alleges that he was fired by NSR because of his race (Caucasian) and/or his gender (male) in violation of Title VII and the PHRA.

In determining whether or not to grant summary judgment in a "reverse" employment discrimination case, I must apply the burden-shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36

L.Ed.2d 668 (1973). *Iadimarco v. Runyon*, 190 F.3d 151, 158 (3d Cir.1999).^{FN5} To prevail under the burden shifting analysis, Plaintiff must first establish a *prima facie* case of discrimination, which, in the reverse discrimination context, requires the plaintiff to "present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon a trait that is protected under Title VII." *Id.* at 161; *Mosca v. Cole*, 217 F. App'x 158, 161 (3d Cir.2007); *Geddis v. Univ. of Del.*, 40 F. App'x 650, 652 (3d Cir.2002). The primary purpose of evaluating the *prima facie* case is to "eliminate the most obvious, lawful reasons for the defendant's action," *Piviroto v. Innovative Sys., Inc.*, 191 F.3d 344, 352 (3d Cir.1999), and the plaintiff's evidentiary burden at this stage is "not intended to be onerous." *Marzano v. Computer Sci. Corp.*, 91 F.3d 497, 508 (3d Cir.1996).

FN5. Both parties agree that this case should proceed under the *McDonnell Douglas* burden-shifting analysis and not under the direct evidence theory of liability set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

If a plaintiff establishes a *prima facie* case, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *See Burdine*, 450 U.S. at 254-56. The defendant satisfies this burden by introducing evidence, which, if taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision. *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir.1994). If the defendant meets this minimal burden, then the plaintiff must prove, by a preponderance of the evidence, that the articulated reason was a mere pretext for discrimination. *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108 (3d Cir.1997). Throughout this analysis, the ultimate burden of proving intentional discrimination rests with the plaintiff. *Fuentes*, 32

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F.3d at 763.

a. Prima Facie Case

NSR first argues that Plaintiff cannot meet his burden of proving a *prima facie* case of reverse gender and/or race discrimination because there is no evidence of similarly-situated female and/or non-Caucasian employees who were treated more favorably than Plaintiff. Plaintiff disagrees and points to a list of alleged comparators he claims received less severe discipline for similar infractions. Although, for the reasons set forth *infra*, I find that NSR's arguments have considerable force, I also recognize that the burden of establishing a *prima facie* case is much less onerous than proving pretext with similar evidence. See *Simpson v. Kay Jewelers, Div. of Sterling, Inc.*, 142 F.3d 639, 646 (3d Cir.1998). I do not need to resolve this question, however, because even assuming *arguendo* that Plaintiff has established a *prima facie* case, I find, for the reasons set forth below, that NSR has articulated a legitimate, nondiscriminatory reason for terminating his employment, and Plaintiff cannot point to sufficient evidence from which a fact finder could conclude that NSR's stated reason was a pretext for discrimination.

b. NSR's Articulated Reason

*5 NSR's articulated reason for terminating Plaintiff's employment is that, while driving a "key train" containing hazardous materials on September 8, 2004, Plaintiff disregarded specific instructions from a train dispatcher to reduce his speed, and operated his train over the speed limit multiple times during the same trip. NSR's Br. (Docket No. 45) at 15-16. Hearing officer Neville Wilson made the decision to discharge Plaintiff after an investigative hearing, and Division Superintendent Mark Hamilton upheld that decision on appeal. Plaintiff's union (Defendant BLET) further appealed his dismissal to Special Board of Adjustment No. 1063, which also upheld Plaintiff's discharge. In its written findings denying Plaintiff's appeal, the Special Board of Adjustment stated,

among other things:

We note that this was not Claimant's first discipline for speeding. In December 2002, Claimant was issued a thirty day suspension for speeding. This Board, on previous occasions, has recognized that speeding is a serious violation that may warrant dismissal. Claimant's disregard for the Carrier's rules is magnified when one considers that his train was designated a key train because of the number of cars carrying hazardous materials. Claimant was not only over the speed limit for all trains because of the weather conditions, but was in excess of the speed limit for key trains under ideal conditions. The Board is particularly aware of the consequences of derailments involving hazardous materials.

Docket No. 50, Ex. 15.

I find that NSR's articulated reason is a more than legitimate nondiscriminatory reason for discharge. See, e.g., *Messina v. E.I. Dupont de Nemours & Co.*, 141 F. App'x 57, 60 (3d Cir.2005) (violation of safety rule reason for legitimate, nondiscriminatory discharge). Because NSR has satisfied its burden of production in this regard, the burden of persuasion is on Plaintiff to show pretext.

c. Pretext

"To survive summary judgment when the employer has articulated a legitimate, non-discriminatory reason for its action, the plaintiff must point to some evidence ... from which a fact-finder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely or not a motivating or determining cause of the employers action." *Simpson*, 142 F.3d at 644 (quoting *Fuentes*, 32 F.3d at 764); see also *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). To discredit the employer's articulated reasons (the first method of proving pretext), the plaintiff

need not "produce evidence that necessarily leads

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to the conclusion that the employer acted for discriminatory reasons, nor produce additional evidence beyond [his] prima facie case." *Id.* (citations omitted). The plaintiff must, however, point to "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons [such] that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the proffered nondiscriminatory reason did not actually motivate the employer's action."

*6 *Id.* (quoting *Fuentes*, 32 F.3d at 764-65).

To show that discrimination was more likely than not a cause for the employer's action (the second method of proving pretext), "the plaintiff must point to evidence with sufficient probative force that a factfinder could conclude by a preponderance of the evidence that" the plaintiff's age, race, gender, and/or other protected trait, "was a motivating or determinative factor in the employment decision." *Id.* Among other things, the plaintiff may show that the employer: (1) has previously discriminated against him; (2) has discriminated against other persons within the plaintiff's protected class or within another protected class; or (3) that the employer has treated more favorably similarly situated persons not within the protected class. *Id.* at 645 (citing *Fuentes*). The burden of proving pretext is a difficult one, *Fuentes*, 32 F.3d at 765; *Kautz*, 412 F.3d at 467, and one that Plaintiff cannot meet in this case.

As an initial matter, I note the particular strength of NSR's articulated reason for discharge in this case. First, Plaintiff admits (and admitted at the time) that he engaged in the behavior (i.e., speeding) with which he was charged. Plaintiff also acknowledges that excessive speeding is a major offense-the highest level of offense-under NSR's START policy and that the START policy expressly allows NSR to dismiss an employee from service for even one major offense if proven guilty. *See* NSR's App. (Docket No. 50), Ex. 4. It also is

undisputed that Plaintiff was found guilty of excessive speeding after an investigative hearing and that his dismissal was upheld both by the Division Superintendent and after an independent review by the Special Board of Adjustment.^{FN6} *Id.*, Exs. 10, 13, 15. Further, the dangers of speeding while driving a train, especially a train carrying hazardous materials, cannot be understated. Even Plaintiff admits that speeding can result in serious death or injury both to railroad workers and members of the general population as well as significant property damage. Pl.'s Resp. to NSR's St. Mat. Facts (Docket No. 61) ¶ 42. The record evidence also demonstrates that NSR recognized the dangers of excessive speeding and communicated those dangers to its employees. *See id.* ¶ 41; NSR's St. Mat. Facts (Docket No. 44) ¶ 41; NSR's App., Exs. 4, 16-19.

FN6. These procedural safeguards were followed as provided by the applicable collective bargaining agreement and the Railway Labor Act.

In an effort to overcome these admissions and demonstrate pretext, Plaintiff offers a number of arguments as to why NSR's reason for discharge is nevertheless implausible. Pl.'s Br. Opp. (Docket No. 70) at 27-29. None of these arguments is persuasive.

(1) Comparator Evidence

As set forth above, Plaintiff has never denied that he engaged in the behavior with which he was charged. Rather, Plaintiff's overarching argument in support of his discrimination claims is that NSR disciplined him more severely for that behavior than it disciplined African-American and/or female employees. This argument fails, however, because the individuals to whom Plaintiff points were not similarly-situated to him or did not commit comparable offenses and, therefore, are not valid comparators for purposes of demonstrating pretext.

*7 Although a plaintiff may use evidence that he was disciplined more severely than employees of

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a different race or gender who committed comparable offenses to show pretext, such evidence is relevant only if the comparators and the plaintiff are "similarly situated." *Maull v. Div. of State Police*, 39 F. App'x 769, 773 (3d Cir.2002) (citing *Fuentes*, 32 F.3d at 765). Although "similarly situated" does not mean "identically situated," the plaintiff generally must demonstrate that he was similar to the alleged comparators in all relevant aspects. See *Williams v. Potter*, Civil Action No. 07-02, 2008 WL 282349, at *3 (W.D.Pa. Jan.31, 2008); *Red v. Potter*, 211 F. App'x 82, 84 (3d Cir.2006); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir.1998). In the discipline context, a plaintiff must show that the alleged comparator's acts "were of comparable seriousness to his own infraction, and that the [comparator] engaged in the same conduct without such differentiating or mitigating circumstances as would distinguish the [comparator's] conduct or the employer's resulting treatment of [him]." *Tyler v. SEPTA*, No. Civ. A. 99-4825, 2002 WL 31965896, at *3 (E.D.Pa.Nov.8, 2002) (alterations in original), *aff'd*, 85 F. App'x 875 (3d Cir.2003); see also *Jackson v. Bob Evans-Columbus*, No. 2:04cv559, 2006 WL 3814099, at *7 (W.D.Pa. Dec.22, 2006); *Ogden v. Keystone Residence*, 226 F.Supp.2d 588, 603 (M.D.Pa.2002) ("Showing that an employee is similarly situated is no easy task."). Whether alleged comparators are indeed similarly situated is a case-specific analysis, and one which is appropriate for the district court to evaluate at the summary judgment stage. *Maull*, 39 F. App'x at 769 (citing *Simpson*, 142 F.3d at 645).

Here, Plaintiff provides in his brief a summary of nineteen "primary examples" of African-American and/or female NSR engineers and conductors whom he claims are similarly situated and received lesser discipline for comparable offenses. Pl.'s Opp. Br. at 9-14. According to Plaintiff, twelve of these individuals-EC, VP, CR, EK, LT, RJ, TH, JR, GC, TN, ES, and MA ^{FN7}-committed operational violations more severe than Plaintiff's violation and were not discharged. Of

these twelve, seven (EC, VP, CR, EK, LT, RJ, and TH) are African-American males and three (GC, ES, and MA) are Caucasian females. Two, JR and TN, are African-American females. See Pl.'s Opp. Br. at 9-12. Plaintiff contends that the remaining seven alleged comparators-JRB, ET, KR, EA, EST, RF, and LR-committed non-operational violations involving absenteeism and drug-and-alcohol issues. Of these seven, JRB, ET, KR, EA, EST, and RF are African American males and LR is a Caucasian female.

FN7. Pursuant to a prior Order of Court in this case, I am using only initials to protect the privacy of these individuals.

A close examination of the undisputed facts, however, reveals that these alleged comparators are not similarly situated to Plaintiff. As an initial matter, the majority of the alleged comparators-TN, VP, CR, EK, LT, RJ, TH, JR, TN, and RF-did not work in the Pittsburgh division, and there is no evidence that they were ever supervised and/or disciplined by Mr. Wilson or Mr. Hamilton, the decisionmakers in this case. Accordingly, the discipline these individuals did or did not receive does not cast doubt on NSR's articulated reason for discharging Plaintiff and is not evidence that Mr. Wilson or Mr. Hamilton acted with discriminatory intent.

*8 Plaintiff's argument that the law does not require that employees have the same supervisor to be similarly situated does not change this result. See Pl.'s Opp. Br. at 17-20. I agree with Plaintiff that there is no *per se* "same supervisor" rule in the "similarly-situated" analysis. See *Sprint/United Mgmt. Co. v. Mendelsohn*, --- U.S. ---, ---, 128 S.Ct. 1140, 1147, ---L.Ed.2d ---, --- (2008). I disagree, however, that the identity of the supervisor/decisionmaker is irrelevant in this case. Even the cases Plaintiff cites in his brief recognize that whether comparators had the same supervisor is *often* relevant to the similarly-situated analysis in discipline cases. See, e.g., *Johnson v. Kroger Co.*, 319 F.3d 858, 867 (6th Cir.2003) (citing

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Ercegovich, 154 F.3d at 352). As set forth above, it is particularly relevant here, where the question is whether hearing officer Wilson's stated reason for discharging Plaintiff, as affirmed by Mr. Hamilton, is pretextual. The discipline imposed by other hearing officers on conductors or engineers working under different supervisors in other NSR divisions simply does not speak to whether Mr. Wilson or Mr. Hamilton acted with discriminatory intent in this case.^{FN8}

FN8. Perhaps recognizing this, Plaintiff argues in his opposition brief that the relevant supervisor is Scott Weaver, NSR's National Director of Labor Relations, because Mr. Weaver made the final decision to affirm Mr. Wilson and Mr. Hamilton's termination decision prior to arbitration. Pl.'s Opp. Br. at 20. This argument is without merit. As NSR notes, there is no evidence that Mr. Weaver played any substantive role in disciplining Plaintiff or any other alleged comparator. To the contrary, the evidence indicates that the Pittsburgh division employees (Wilson and Hamilton) were responsible for charging Plaintiff with misconduct and assessing discipline and that Mr. Weaver would not overturn a dismissal absent Mr. Hamilton's agreement.

Plaintiff also seeks to overcome the common supervisor issue by suggesting that the Court already resolved this question in his favor when it ordered NSR to produce disciplinary records for employees in the three geographical divisions adjacent to Pittsburgh in connection with Plaintiff's claim of a company-wide pattern and practice of reverse discrimination. Pl.'s Opp. Br. at 20. This argument is likewise unpersuasive. As NSR notes, relevancy in Rule 26 is not the equivalent of relevancy at trial. Rather, discovery is

permitted to the extent it *could* lead to admissible evidence. Unfortunately for Plaintiff, it did not lead to such evidence in this case. Even viewing the records in the light most favorable to Plaintiff, no reasonable jury could conclude that he was a victim of a company-wide practice of reverse discrimination or that Mr. Wilson or Mr. Hamilton acted with discriminatory intent.

For similar reasons, it is unhelpful to compare Plaintiff's termination to discipline former Conrail conductors and engineers, including EC, GC, TN, and MA, received prior to NSR's acquisition of Conrail in 1999. Not only is such discipline remote in time, but Conrail was a separate employer not a party to this case. In addition, neither Mark Hamilton nor Neville Wilson was ever employed by Conrail. *See* Hamilton Decl. ¶¶ 5-11, 14 (Docket No. 50, Ex. 3); Wilson Dep. (Docket No. 62), at 10. Moreover, while Conrail discipline may appear on employees' career service records, the record evidence indicates that NSR did not include Conrail violations (all of which occurred prior to the START program) when assessing discipline. *See id.*; *see also* Hamilton Dep. (Docket No. 50, Ex. 11), at 201.

In addition to those who worked outside of the Pittsburgh division or were disciplined by Conrail, many of Plaintiff's alleged comparators are not similarly situated to him because they did not commit a sufficiently similar offense or group of offenses. Although similarly situated employees do not need to be guilty of exactly the same offense to be valid comparators, a plaintiff and his alleged comparators must have engaged in acts of "comparable seriousness." *See Wright v. Murray Guard, Inc.*, 455 F.3d 702, 710 (6th Cir.2006); *Elmore v. Capstan, Inc.*, 58 F.3d 525, 530 (10th Cir.1995). The comparators to whom Plaintiff cites, however, do not fall within this category.

As an initial matter, Plaintiff stretches this concept too broadly when he suggests that any

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“major” offense under NSR’s START program (or allegedly equivalent combination of minor and/or serious offenses) is automatically comparable to Plaintiff’s excessive speeding offense. Not only does START’s “major” category encompass a wide variety of different types of offenses, but the relative seriousness of each individual violation may vary depending on the facts and circumstances of each case.

*9 To the extent Plaintiff attempts to compare himself to minority employees who committed non-operational violations such as excessive absenteeism or missed calls, this argument fails because employee attendance issues, however serious, simply do not equate to egregious operational safety violations such as excessive speeding. Similarly, Plaintiff cannot successfully compare himself to employees who committed drug and alcohol violations (i.e., “Rule G” violations) and were offered reinstatement through NSR’s Drug and Alcohol Rehabilitation Services program (“DARS”). NSR’s DARS brochure plainly states that participation in DARS will not jeopardize employee jobs because “DARS is designed to help employees overcome debilitating and sometimes deadly drug and alcohol addiction.” See NSR’s App’x, Ex. 42. NSR certainly is entitled to treat drug and alcohol-related infractions differently than other violations, and its business decision to do so is not evidence of discrimination.^{FN9}

FN9. NSR also has provided a declaration from Mark Hamilton identifying a number of Caucasian male employees with significant missed call histories who were not terminated as well as a list of Caucasian male employees who violated Rule G but were reinstated through the DARS program. Hamilton Decl. ¶¶ 25, 40 (Docket No. 50, Ex. 3). For this reason as well, Plaintiff’s arguments are not indicative of reverse discrimination. See *Simpson*, 142 F.3d at 646-47 (plaintiff cannot pick and choose his comparators).

Moreover, Plaintiff has failed to identify any employees who committed operational violations of comparable seriousness to his. The only Pittsburgh employees Plaintiff names in his brief who committed any type of speeding violation are EC and EA. As NSR notes, however, unlike the excessive speeding violation that led to Plaintiff’s discharge, EC and EA’s speeding violations were their first as NSR employees.^{FN10} In addition, there is no evidence that EC or EA intentionally disregarded a safety directive from a dispatcher or were driving a train carrying hazardous materials. The other operational violations to which Plaintiff cites, including passing a stop signal, are likewise not comparable under the facts of this case because, as with the speeding violations at issue, there is no evidence that any of these violations involved any of the aggravating factors that NSR claims led to Plaintiff’s dismissal in this case.^{FN11}

FN10. Although Plaintiff argues that EC had two speeding violations, EC’s “first” violation occurred in 1996 while he was employed by Conrail. For the reasons set forth *supra*, EC’s disciplinary history with Conrail is not a relevant consideration in this case.

FN11. In looking at these factors, I am not holding that other violations such as passing a stop signal are *per se* incomparable to a speeding violation. I must focus, however, on the criteria for termination identified by the employer, including the aggravating factors such as Plaintiff’s prior speeding offense, his admitted intentional disregard of the speeding directive, and the fact he was driving a key train. This is especially true during the pretext stage of the analysis. If plaintiff had pointed to evidence of a minority employee with a similar disciplinary history who had passed a stop signal while driving a key train or in hazardous conditions or in violation of a

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directive from a dispatcher, yet was not discharged, that employee may be similarly situated to plaintiff despite the fact that they committed different violations. There is no such evidence in this case.

In short, even viewing the facts in the light most favorable to Plaintiff, he has failed to produce evidence of similarly-situated comparators from which a reasonable fact-finder could conclude that NSR's articulated reasons for Plaintiff's discharge were pretextual. To the contrary, the evidence indicates that Plaintiff's race and/or gender did not play a role in the discharge decision.^{FN12} Accordingly, I must turn to Plaintiff's other evidence of pretext.

FN12. Indeed, Randy Zam, Plaintiff's conductor during the September 8, 2004 incident, a Caucasian male, and perhaps Plaintiff's closest comparator attended the same hearing as Plaintiff before Mr. Wilson but was suspended rather than discharged. This is further evidence that NSR's based its decision to terminate rather than suspend Plaintiff on factors other than gender and race.

(2) Other Arguments

Plaintiff's remaining arguments in support of his race and gender discrimination claims are likewise without merit. The first three of these arguments amount to little more than Plaintiff's opinion as to why his discipline was excessive under the circumstances. First, Plaintiff argues that NSR's reliance on his prior speeding violation as a factor in deciding to discharge (as opposed to suspend) him for the September 8, 2004 speeding incident is pretextual because the first violation (for speeding in the yard) was only a "serious" violation under the START program and not a "major" violation like the September 2004 excessive speeding charge. Pl.'s Br. Opp. at 27. Second, Plaintiff claims there is no support for NSR's contention that speeding is a more severe offense

on the railroad than other major violations he did not commit such as violating stop signals, derauling trains, and substance abuse. *Id.* Third, Plaintiff insists that NSR should have taken into account the fact that, despite the potential for significant adverse consequences, no such consequences occurred in his case. *Id.* at 28.

*10 As an initial matter, there is no evidence indicating that NSR was required to impose lesser discipline in Plaintiff's case. To the contrary, Plaintiff admits that NSR's START policy permitted dismissal from employment for even a first major offense, including the offense of excessive speeding.^{FN13} Plaintiff's personal belief that NSR should have imposed a lesser sanction in his case based on mitigating factors is simply not proof of pretext. See *Billet v. CIGNA Corp.*, 940 F.2d 812, 825 (3d Cir.1991) ("[T]he fact that an employee disagrees with an employer's evaluation [of his performance or misconduct] does not prove pretext."); *Jackson*, 2006 WL 3814099, at *7. It is well-established that "pretext is not shown by evidence that 'the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.'" *Kautz*, 412 F.3d at 467 (quoting *Fuentes*, 32 F.3d at 765); see also *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1109 (3d Cir.1997) ("The question is not whether the employer made the best or even a sound business decision; it is whether the real reason is discrimination."). As the Court of Appeals for the Third Circuit has made clear, "an employer may have any reason or no reason for discharging an employee so long as it is not a discriminatory reason .[W]e do not sit as a super-personnel department that reexamines an entity's business decisions." *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 332 (3d Cir.1995); see also *Kautz*, 412 F.3d at 468 (generally, the court "will not second guess the method an employer uses to evaluate its employees").^{FN14}

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FN13. Contrary to the suggestion in Plaintiff's opposition brief, the deposition testimony of Neville Wilson and Mark Hamilton does not support the proposition that, in all circumstances, "[t]he absence of adverse consequences will reduce the severity of discipline for a particular violation, or will place the violation in a lesser disciplinary category." Pl.'s Opp. Br. at 28. Wilson and Hamilton testified only that the lack of adverse consequences is a factor to be considered, not that the lack of such consequences precludes dismissal. It is not my role (nor Plaintiff's) to second guess NSR's business decision that the potential for severe adverse consequences in Plaintiff's case warranted dismissal.

FN14. Plaintiff also reiterates throughout his summary judgment materials that he did not heed the dispatcher's reduced-speed directive because, *inter alia*, he did not want to "outlaw" his train; he did not observe any standing water on the tracks (and was told by a train in front of him that there was no such water); and his conductor told him it was alright not to reduce his speed. An employee's explanation of the reasons for his conduct, however, is not evidence of pretext. *See Kautz*, 412 F.3d at 475-76.

In his fourth argument that NSR's reason is "implausible," Plaintiff primarily rehearses his contention that he should have been suspended rather than discharged because the September 8, 2004 incident was his first "major" violation under START. Pl.'s Opp. at 28. As set forth above, NSR policy does not require such progressive discipline, and Plaintiff's opinion in this regard is not evidence of pretext. To the extent Plaintiff further implies in his fourth argument that the true reason he was discharged rather than suspended is because the key decisionmaker (hearing officer Neville Wilson) is African-American, such argument is patently

without merit. *See Iadimarco*, 190 F.3d at 156 (the "mere fact" that key decisionmakers are black, without more, is insufficient to infer even a *prima facie* case of discrimination). There is not any record evidence suggesting that Wilson's race played any role in his decision to discharge Plaintiff.

Finally, Plaintiff appears to cite to NSR's diversity initiatives as evidence of a corporate "culture of affirmative action" encouraging reverse discrimination.^{FN15} Pl.'s Opp. Br. at 28-29; *see also id.* at 7-8; Complaint ¶ 13j. I firmly disagree. As NSR correctly notes, the law allows and even encourages race neutral methods to achieve diversity. *See NSR's Reply Br.* (Docket No. 72) at 5. As one court within this Circuit has explained:

FN15. In support of this contention, Plaintiff cites to his statement of material facts in which he refers to specific initiatives NSR instituted in 2001 pursuant to a consent decree entered into in an unrelated class action, including training about diversity, the creation of a "diversity council," honoring each February as "African-American Railroader Month," and naming a facility in honor of Martin Luther King, Jr. Pl.'s Opp. Br. at 28-29 (citing Pl.'s Resp. to NSR's Stat. Mat. Facts ¶¶ 167-171).

*11 Such diversity awareness programs ... ensure that companies ... have the ability to hire a workforce that will enable it to effectively service an increasingly diverse customer base. This is to say nothing of the laudable goal of expanding the horizons of opportunity for more and more members of this great pluralistic society. To be sure, this is not to say that Caucasian males should now be discriminated against. No contrary conclusion is supported by the record presently before the court.

Reed v. Agilent Techs., Inc., 174 F.Supp.2d 176, 186-87 (D.Del.2001). I agree with the court in *Reed* that to use diversity concerns, without

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more, as evidence of discrimination would be irresponsible. *See id.* In connection with this argument, Plaintiff also cites to the opinion testimony of Paul Hamrick (a union official and former NSR employee who retired from a different division of NSR over a year prior to the speeding incident in this case) that NSR applies its disciplinary process more harshly to white males over age 40 than to African American, female or younger engineers and conductors. Pl.'s Opp. Br. at 28-29 (citing Pl.'s Resp. to NSR's Stat. Mat. Facts ¶¶ 174-177). A close reading of Mr. Hamrick's deposition testimony, however, reveals that his opinions are themselves conclusory and unsupported and, therefore, are not evidence of pretext or discrimination. *See Jalil v. Advel Corp.*, 873 F.2d 701, 707 (3d Cir.1989) (conclusory allegations of discrimination are insufficient to defeat summary judgment); *Jackson*, 2006 WL 3814099, at *7.

For all of these reasons, Plaintiff has failed to demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the NSR's proffered reasons for its action that a reasonable factfinder could rationally find them unworthy of credence. Plaintiff likewise has failed to offer any evidence from which a reasonable jury could conclude that his race and/or gender were more likely than not a motivating or determinative cause of his discharge. Accordingly, NSR's motion for summary judgment as to Plaintiff's reverse race and gender discrimination claims is granted.

2. Age Discrimination Claim-ADEA and PHRA

Plaintiff also argues that NSR discriminated against him in violation of the ADEA and PHRA because it disciplined younger employees less severely for similar offenses. To establish a *prima facie* case of age discrimination, a plaintiff must show: (1) he is at least 40 years of age; (2) he was qualified for the position; (3) he suffered an adverse employment decision; and (4) non-members of the protected class were treated more favorably (or there are other circumstances giving rise to an

inference of age discrimination). *See Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1102 (3d Cir.1997). Again, although NSR argues that Plaintiff cannot meet prong four of this standard, I do not need to resolve this issue because assuming *arguendo* Plaintiff can show a *prima facie* case, his claim fails at the more rigorous pretext stage of the summary judgment analysis.

*12 Plaintiff points to six alleged similarly-situated younger NSR conductors or engineers-EK, DH, JD, JB, JM, and TS-whom he claims committed comparable violations yet received less severe discipline. For reasons similar to those discussed with respect to Plaintiff's gender and race reverse discrimination claims, these comparators had sufficient differentiating or mitigating circumstances that they are not similarly situated to Plaintiff. Among other things, at least four of the six alleged comparators-EK, DH, JD, and TS-were not part of the Pittsburgh division and were not evaluated or disciplined by Mr. Wilson or Mr. Hamilton. Of the remaining two, there is no evidence that JM committed any violation similar to that for which NSR discharged Plaintiff. Finally, although it appears that JB's violations included speeding, the record indicates that NSR fired JB after his second excessive speeding violation in June 2004.^{FN16}

FN16. The record further indicates that NSR also dismissed JB after his first speeding violation in November 2002 but that he was returned to service in February 2003. NSR also discharged JB for failing to obey a stop signal in June 2003, but that decision was overturned in arbitration by the Special Board of Adjustment. Thus, even if JB were a relevant comparator, which he is not, NSR treated him similarly, if not more harshly, than Plaintiff.

Most of Plaintiff's remaining arguments that NSR's articulated reason for his discharge is a pretext for age discrimination are largely the same as his arguments in support of his race and gender

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discrimination claims. For the reasons set forth in Section II.B.1.c(2), *supra*, these arguments are without merit.

The only argument that pertains uniquely to Plaintiff's age discrimination claim is Plaintiff's testimony that Mark Hamilton (the then-Division Superintendent that affirmed Plaintiff's discharge at the first level of appeal) remarked to Plaintiff that "it seems as though guys your age are getting a lot more injuries on my railroad these days." Pl.'s Br. Opp. at 29. According to Plaintiff, Hamilton made this statement approximately three years prior to his discharge, while he was driving Plaintiff to a medical examination after Plaintiff reported suffering a groin injury at work.

Even if true, however, Mr. Hamilton's alleged statement is insufficient evidence of pretext. It is well-established in the Third Circuit that "[s]tray remarks by non-decisionmakers or decisionmakers unrelated to the decision process are rarely given great weight, particularly if they were made temporally remote from the date of decision." *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 545 (3d Cir.1992); *see also Wimberly v. Severn Trent Servs., Inc.*, Civ. Action No. 05-2713, 2007 WL 666767, at *5 (E.D.Pa. Feb.26, 2007) (remark by decisionmaker made nine months prior to plaintiff's transfer that "it's time for us to mentor someone younger and pass our knowledge on" was insufficient evidence of pretext). Here, even if I consider Hamilton a decisionmaker with respect to Plaintiff's discharge, his alleged comment was entirely unrelated to that decision process and was made almost three years prior to the date of the termination decision. Thus, the comment is at best a classic "stray remark" and is not sufficient evidence of age discrimination.

For all of the above reasons, I find that Plaintiff has failed to rebut NSR's nondiscriminatory reason for his discharge and there is no evidence from which a reasonable factfinder could find that reason was a pretext for age discrimination.

C. Plaintiff's Claims Against BLET

*13 Plaintiff also has brought Title VII and PHRA claims against his union, BLET, arguing that BLET "shirked its duty to properly represent Plaintiff and instead acquiesced and joined in [NSR's] racial and gender discrimination against him." Complaint ¶ 131.^{FN17} Plaintiff contends that BLET was aware that similarly situated African-American and/or female employees had received more favorable discipline for committing major violations but did not pursue this argument when appealing Plaintiff's discharge. *Id.* ¶ 13m. Thus, according to Plaintiff, BLET "cooperated and aided and abetted [NSR] in its discriminatory practice of administering discipline and/or adverse job actions disparately according to the race and/or sex of the employee being disciplined." *Id.*

FN17. Plaintiff appears to have abandoned his age discrimination claim against BLET. *See* BLET's Br. at 16 n. 3. Accordingly, BLET's motion for summary judgment is granted as to these claims.

BLET's motion for summary judgment as to Plaintiff's claims is granted. As an initial matter, to the extent Plaintiff is merely repackaging a breach of a duty of fair representation claim under the RLA as a federal discrimination claim, such claim is barred by the applicable statute of limitations. The union's duty of fair representation arises from the obligations imposed on unions under the RLA, 45 U.S.C. § 151, *et seq.* This statutory duty requires the union to represent bargaining unit employees honestly and in good faith without invidious discrimination or arbitrary conduct. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976); *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 76, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991). A breach of the duty of fair representation occurs when the union's conduct toward a member of the collective bargaining unit is "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); *O'Neill*, 499 U.S.

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at 67.

It is well-established that “the statute of limitations for a duty of fair representation claim against a union under the RLA is six months.” *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 304 (3d Cir.2004); *Sisco v. Consol. Rail Corp.*, 732 F.2d 1188, 1194 (3d Cir.1984). Where a union represents an employee in an arbitration proceeding, the employee's cause of action generally accrues when the arbitration board denies the employee's claim. *See Bensel*, 387 F.3d at 307; *Whittle v. Local 641*, 56 F.3d 487, 490 (3d Cir.1995); *Childs v. Pa. Fed'n Bhd. of Maint. Way Employees*, 831 F.2d 429, 436 (3d Cir.1987).

Here, the latest a DFR claim could have accrued was March 30, 2005, when the Special Board of Adjustment issued its award denying Plaintiff's grievance. Plaintiff, however, did not file the instant action until January 19, 2006—well after the six-month statute of limitations expired. Because any DFR claim would be untimely, Plaintiff's claims against BLET must be dismissed to the extent that the substance of those claims boils down to a garden-variety claim that the BLET breached its duty of fair representation. *See Johnson*, 828 F.2d at 967.

Plaintiff argues that the statute-of-limitations argument is not dispositive because a union's breach of the duty of fair representation may subject it to Title VI liability when the breach itself is discriminatory. In support, Plaintiff relies on a line of federal cases out of the Southern District of New York recognizing this theory as a viable cause of action under Title VII. *See, e.g., Cooper v. Wyeth Ayerst Lederle*, 106 F.Supp.2d 479, 498 (S.D.N.Y.2000) (“It is well established that a union's breach of its duty of fair representation may render it liable under Title VII.”); *Gorham v. Transit Workers Union of Am.*, No. 98 Civ. 313(JGK), 1999 WL 163567 (S.D.N.Y. Mar.24, 1999); *Nweke v. Prudential Ins. Co. of Am.*, 25 F.Supp.2d 203, 220 (S.D.N.Y.1998); *Morris v. Amalgamated Lithographers of Am.*, 994

F.Supp. 161 (S.D.N.Y.1998); *see also* 42 U.S.C. § 2000e-2(c)(1) (It is unlawful for a union to “exclude or expel from its membership, or otherwise discriminate against, any individual because of his race, color, religion, sex or national origin.”). Under these cases, the Title VII statute of limitations, and not the six-month RLA statute of limitations, would control. *Cooper*, 106 F.Supp.2d at 500; *Blaizin v. Caldor Store # 38*, No. 97 Civ. 1604(DAB), 1998 WL 420775 (S.D.N.Y. July 27, 1998).

*14 Even under this theory, however, Plaintiff's claims against BLET cannot survive BLET's motion for summary judgment. The crux of Plaintiff's argument is that BLET, “through not listening to Plaintiff's suggestions to delve into [his] employer's discriminatory practices, essentially ratified the employer's discriminatory practice.” Pl.'s Br. Opp. (Docket No. 69) at 6. In support, Plaintiff cites cases indicating that “a union's role in ratifying an employer's discriminatory practice could be sufficient to compel a finding of liability against it.” *Nweke*, 25 F.Supp.2d at 220. These cases, however, also hold that a union “cannot be said to have condoned or ratified a discriminatory practice [under this theory] absent a showing of discrimination on the part of [the employer].” *Id.* at 224. As set forth in Section II.B, *supra*, Plaintiff has failed to make such a showing against NSR. Accordingly, his “union acquiescence” theory against BLET likewise must fail. *See Nweke*, 25 F.Supp.2d at 224.

To the extent Plaintiff further argues that BLET affirmatively discriminated against him on the basis of his race and gender because it did not pursue a discrimination claim against NSR, this claim is likewise without merit. To make out a prima facie case of a breach of the duty of fair representation under the line of case law on which Plaintiff relies, he must demonstrate: (1) that the union breached its duty of fair representation by allowing an alleged breach of the collective bargaining agreement to go unrepaired; and (2) that

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the union's actions were motivated by gender or racial animus. *Cooper*, 106 F.Supp.2d at 502. Here, there is no evidence that BLET's actions (or inactions) were in any way motivated by discriminatory animus or that BLET handled Plaintiff's grievance any differently than it handled grievances made by female or African-American employees. See *Nweke*, 25 F.Supp.2d at 223.

In addition, there is no evidence that BLET breached its duty of fair representation. As set forth above, a union breaches its duty of fair representation "only when its conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Gorham*, 1999 WL 163567, at *3 (citing *O'Neill*, 499 U.S. at 76). "Union members cannot expect that their Union's conduct during the grievance and arbitration process will be error-free," and, thus, "mere proof of an error in judgment is insufficient to sustain a member's burden of showing that his union breached its duty of fair representation." *Id.* Here, even assuming that BLET made a tactical error by arguing that the Plaintiffs's discipline was excessive rather than that Plaintiff was treated differently because of his race or gender, this is not sufficient to show "bad faith," especially where, as here, there is no evidence (other than Plaintiff's conclusory and unsupported allegations) that BLET could substantiate such a claim or could obtain information from NSR to support such a claim. If anything, the undisputed evidence of record demonstrates that BLET vigorously represented Plaintiff's interests despite overwhelming evidence against him by, *inter alia*, representing Plaintiff in the grievance hearing, cross-examining NSR's witnesses, asserting that the penalty of discharge was excessive, writing a letter of appeal to management, and further appealing the case to arbitration again arguing for a reduced penalty.

III. CONCLUSION

*15 For all of these reasons, I find that based on the evidence of record, even when viewed in the light most favorable to Plaintiff, no reasonable

factfinder could conclude that Defendants intentionally discriminated against Plaintiff based on his race, gender, and/or age. Accordingly, Defendants' Motions for Summary Judgment are granted.

ORDER OF COURT

AND NOW, this 20th day of March, 2008, after careful consideration of the submissions of the parties and for the reasons set forth in the Opinion accompanying this Order, it is ordered that Defendant Norfolk Southern Corporation's Motion for Summary Judgment (Docket No. 43) and Defendant BLET's Motion for Summary Judgment (Docket No. 42) are GRANTED.

The case will be marked "CLOSED" *forthwith*.

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