IN THE CIRCUIT COURT OF THE
FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR BAY COUNTY, FLORIDA

CASE NO.: 20-1566-CA

KOZMAS SMITH, SHANE SMITH,
LANDON GREEN, and ERVIN GREEN,
Plaintiffs,

v.

CITY OF PANAMA CITY BEACH,
Defendants.

ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT

THIS MATTER is before the Court on the Defendant's Motions for Summary Judgment against Shane Smith, filed on December 8, 2021; Motions for Summary Judgment against Landon Green, filed on December 15, 2021; Motions for Summary Judgment against Ervin Green, filed on January 3, 2022; Motions for Summary Judgment against Kozmas Smith, filed on January 14, 2022; the Supplement to Defendant's Motions for Summary Judgment, filed on August 15, 2022, and the Second Supplement to Defendant's Motions for Summary Judgment, filed on March 23, 2023 (collectively the "Motions"). Plaintiffs filed their respective Responses and Memoranda in Opposition to Defendant's Motions on August 30, 2022, and April 26, 2023. The Motions were initially heard on November 8, 2022. Following the summary judgment hearing, and after Defendant raised objections to the testimony of four undisclosed witnesses presented by Plaintiffs in support of their opposition to Defendant's Motions, the parties were allowed to conduct additional discovery and supplement their filings. Accordingly, having considered said Motions, Plaintiffs' Responses, the parties' supplemental filings, court file and records, the summary judgment evidence and arguments of counsel, and being otherwise fully advised, this Court finds as follows:

BACKGROUND INFORMATION

1. Plaintiffs initiated the underlying employment discrimination case on September 1, 2020. The initial Complaint included five counts of race discrimination and five counts of

retaliation under Chapter 760. On February 18, 2022, one of the initial Plaintiffs, Christopher Jackson, voluntarily dismissed his claims.

2. In December 2021 and January 2022, Defendant filed its initial motions for summary judgment against the remaining four Plaintiffs.

3. Meanwhile, Plaintiffs filed new EEOC[1] charges of discrimination regarding the relevant events in this case. Because the latest allegations were under investigation, Plaintiffs were prevented from amending their complaint to include such before issuing the EEOC's right-to-sue letter. Accordingly, this Court entered an order extending the already expired discovery period for the newly filed EEOC changes and allowed Plaintiffs additional time to complete the required administrative process. *See* Order on February 8, 2022, Hearing.

4. On June 17, 2022, the Court entered another Order Resetting Summary Judgment Deadlines and Trial Date. Among other things, the Court directed Plaintiffs to file their Amended Complaint and for Defendant to amend its previously filed motions for summary judgment to address any new allegations.

5. In the currently operative Amended Complaint, filed on August 3, 2022, the individual Plaintiffs, Kozmas Smith, Shane Smith, Ervin Green, and Landon Green, alleged four counts of race discrimination (Counts I, II, III & IV), and four counts of retaliation under Chapter 760, Florida Statutes (Counts V, VI, VII &VIII).

Kozmas Smith

6. Kozmas Smith, an African-American male, began his employment with Defendant in January 2007 and worked in maintenance for Defendant's Public Works Department at the time relevant to this matter. He claims race discrimination (Count I) and retaliation (Count V) under the Florida Civil Rights Act, Chapter 760.

7. According to the allegations in the Amended Complaint, on or around April 10, 2019, Defendant announced new supervisory positions for Team Leaders but failed to give Kozmas Smith the opportunity to apply because the jobs were never advertised. Subsequently, Defendant appointed Jeremiah Jagers, a white male, as the Team Leader/Supervisor of one of the crews, and Ervin Green, a black male, also a Plaintiff in the underlying litigation, as the Team Leader/Supervisor of the other crew. Plaintiff took issue with the new appointments. According

[1] Equal Employment Opportunity Commission

to the Amended Complaint, around the same time, Defendant began its disparate treatment and retaliation against the African-American employees in the Department.

8. Some of the alleged facts in support of the Amended Complaint are that after the new appointments, Kozmas Smith and the other African-American employees were no longer allowed to come back to the Public Work Department shop during the day and were not allowed to use the bathrooms there while the white employees could continue to go to the shop. Kozmas Smith further alleged that, unlike the white employees who were working under the supervision of Jagers, the African-American employees were subjected to unwarranted and continuous surveillance, harassment, and abuse.

9. For instance, Kozmas Smith asserted that Jagers did not allow the African-American workers to get breakfast between 7 a.m. and 9 a.m., while the white employees could do so. He also claimed that the uniform requirements for white employees were not as strict as the ones imposed on the African-American employees and that the African-American employees were expected to continue with their assigned tasks during lunchtime. In contrast, the white employees were allowed to have breaks. According to Kozmas Smith, he and the other black employees were also discouraged from congregating and were frequently separated during work, even though that often resulted in extended periods to complete the assigned work. He also complained that they were often subjected to condescending, intimidating, and disparaging remarks from their supervisor and were expected to work during unsafe weather conditions such as lightning storms, while the white employees were treated preferentially. He also raised an issue that the overall workload given to the black workers was impossible to complete, while the white employees were favored by their supervisors and they were given more leniency.

10. Kozmas Smith also asserted that Defendant retaliated against him after he reported the disparate treatment and filed several EEOC charges. Lastly, he claimed that he was unlawfully suspended from work and subsequently terminated on December 15, 2021, after being falsely accused of intentional destruction of property and illegal recording in the workplace.

Shane Smith

11. Plaintiff Shane Smith, also an African-American male, began employment with Defendant as a Street Maintenance Worker on or around January 12, 2008. Like his brother, Co-Plaintiff Kozmas Smith, this Plaintiff claims that he was subjected to disparate treatment,

different terms and conditions of employment, and held to a different standard because of his race. Shane Smith also alleged that the mistreatment came mainly from Supervisor Jagers, Defendant's Public Director Kelly Jenkins, and Human Resources Employee Lori Philput.

12. In the Amended Complaint, Shane Smith details instances when Defendant allegedly yelled, intimidated, harassed, and treated him differently than the white employees. He further claimed that after he reported the alleged discriminatory actions to Human Resources and filed the underlying lawsuit, Defendant's discriminatory practices escalated, and Plaintiffs were intentionally targeted by their supervisor, who created false allegations of dress code violations against them, gave them multiple written warnings, bad evaluations, no pay raises and increased the African-American employees' overall workload. On or around October 22, 2019, Shane Smith also filed a claim of discrimination with the EEOC, followed by another one in 2020. He claimed that after the complaints were submitted, he and other African-American employees continued to be treated less favorably than the white employees and were specifically targeted and accused of not doing their jobs. In addition, Shane Smith asserted that after his brother was terminated, the work environment became so intolerable that he was constructively discharged from his job.

Ervin Green

13. The third Plaintiff in this case is Ervin Green, a black male who began employment for Defendant in 2008. In 2019, he was transferred to the Public Workers Department, and in April 2019, he was promoted to one of the two Crew Leaders. (Def.'s Ex. 6, Jenkins Dep. 6:2-9.) Plaintiff's crew consisted of Chris Jackson and Johnny Bell, both black males, and Chance Hammock, a white male. (Def.'s Ex. 10, Org. Chart.) The other Crew Leader, Jagers, was initially in charge of the remaining three Plaintiffs in this case: Landon Green, Shane Smith, and Kozmas Smith. Subsequently, Pat Forman and Robert Ware, white males, also became part of Jagers' crew. (Def.'s Ex. 4, Green Dep. 43:5-44:10).

14. Some of the specific allegations in the Amended Complaint related to Ervin Green are that although he had two bachelor's degrees in accounting and business administration and was qualified for higher positions, for which he applied, Defendant failed to promote him for discriminatory reasons. (Am. Compl. ¶ 116.) Ervin Green alleged that in 2016, he applied for a payroll clerk position and subsequently for an accounting job. However, as stated in the Amended Complaint, Defendant hired two white females who allegedly had no college degrees

nor any relevant experience. Plaintiff also claimed that because of his race, he was demoted and on several occasion, he was denied a pay increase despite of his stellar work. When Plaintiff was finally promoted to the position of Team Leader in 2019, as asserted in the Amended Complaint, he was only given a 5% increase in his pay, which amounted to $0.83 per hour, while the other Team Leader, Jagers, received a raise of $4.25 per hour upon his transfer to the department. (*See* Pl.'s Am. Compl. ¶¶ 125 & 133). Plaintiff also took issue that Jagers was allegedly given more staff for his street team and a less heavy workload than him. Like the other Plaintiffs in this case, he also claimed that white employees were given preferential treatment and higher pay raises than black employees and provided some examples in support of his allegations of disparate treatment.

15. In October 2019, Ervin Green was demoted back to maintenance worker, and Jagers became the leader of both crews. (Am. Compl. ¶ 150). His 5% pay increase was also taken away. (Id.) According to the allegations in the Amended Complaint, after Plaintiff reported the allegedly discriminatory practices, Defendant retaliated against him in the form of excessive workload, continuing surveillance, humiliation, and intimidation. Ervin Greene also claimed that Defendant was aware of the disparate treatment and continued to take no action to stop it.

Landon Green

16. Plaintiff Landon Green is also an African-American male hired by Defendant in October 2017 as a Street Maintenance Trainee. Like the other Plaintiffs, he also alleges that he was subjected to disparate treatment, different terms and conditions of employment, and was held to a different standard because of his race. He further claims that he was subjected to retaliation after reporting the alleged unlawful employment activities. Like the other Plaintiffs in this case, Landon Green also took issue with Defendant's rules regarding the use of the bathrooms, uniform code violations, surveillance practices, mandatory luncheons, bad evaluations, no pay raises, increased workload as well as alleged disparaging and condescending remarks.

17. London Greene also filed several charges of discrimination with the EEOC and claims that after the filings, the racial discrimination escalated. He accused Defendant that it targeted Greene and his companion workers in an attempt to create a negative file against them to justify its illegal actions. He also alleged that his three-day suspension without pay in January 2022 was retaliatory in nature and that he believed he was targeted for termination.

Defendant's Motions for Summary Judgment against Plaintiffs and Plaintiffs' Response in Opposition to the Motions

18. In its initial Motions for Summary Judgment against each one of the Plaintiffs, Defendant alleged that while they might have been unhappy with their jobs, Plaintiffs did not suffer any adverse employment action or retaliation. Therefore, according to the Motions, Plaintiffs could not state a prima facie case for either one of their claims. Defendant also asserted that the alleged causes of action failed because Plaintiffs could not identify a comparator who received preferable treatment and claimed that Plaintiffs did not report or oppose any unlawful conduct under Chapter 760. Therefore, as argued in the Motions, Plaintiffs could not show that they suffered retaliatory actions for any protected activity. Lastly, Defendant asserted that even if Plaintiffs could state prima facie cases for discrimination and retaliation, the City had lawful reasons for its actions.

19. On August 15, 2022, after the filing of the Amended Complaint, Defendant supplemented its prior Motions for Summary Judgment. As explained in the motion, Defendant reasserted its prior arguments and addressed solely any new allegations raised in the Amended Complaint. Precisely, the Supplemental Motion argued that after Defendant learned that Plaintiffs recorded their co-workers without their knowledge, the City Manager, Drew Whitman, decided to suspend Plaintiffs Ervin and Landon Green and terminate Kozmas Smith. With respect to Shane Smith, Defendant took the position that his resignation was voluntary and that he did not suffer any adverse employment action. Defendant further asserted that it did not dispute that Plaintiffs were members of a protected class and that Kozmas Smith, Ervin Green, and Landon Green suffered adverse job actions after recording their co-workers but alleged that Defendant had non-discriminatory reasons for its actions and that Plaintiffs could not show pretext.

20. On August 31, 2022, Plaintiffs filed their Response in Opposition to Defendant's Motions for Summary Judgment. In support of it, among other things, they provided 13 sworn statements of various witnesses who allegedly corroborated Plaintiffs' allegations of disparate treatment based on race.

21. After Defendant opposed the attached sworn statements for failure to disclose, the Court granted in part and denied in part the objection and allowed Defendant to take the depositions of four previously omitted witnesses: Randy Anderson, Kevin Callahan, Jeremy

Heath, and Stephen Pariss. The Court also allowed the parties to supplement their respective filings after the depositions were taken.

22. On March 23, 2023, Defendant filed its Second Supplement to Motion for Summary Judgment. In essence, Defendant argued that the additional testimony of the previously undisclosed four witnesses supported its prior position that Plaintiffs were not treated differently than the white workers and were simply unhappy with the changes in the work atmosphere in the Public Works Department once Kelly Jenkins and Jeremiah Jagers took over.

23. On April 26, 2023, Plaintiffs filed their Response and Memorandum in Opposition, asserting that the depositions of Randy Anderson, Kevin Callahan, Jeremy Heath and Stephen Parris were consistent with their sworn statements and supported Plaintiffs' version of disputed facts.

STANDARD OF REVIEW

24. Effective May 1, 2021, Florida became aligned with "the supermajority of states" by generally adopting the federal summary judgment standard articulated by the U.S. Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (the "*Celotex* trilogy"). *See*, *In re Amendments to Fla. Rule of Civ. Proc. 1.510*, 317 So. 3d 72 (Fla. 2021) ("The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard.").

25. Before May 1, 2021, Florida's prior Rule 1.510 entitled a movant to summary judgment "if the pleadings and summary judgment evidence on file show[ed] there [was] no genuine issue as to any material fact and that the moving party [was] entitled to judgment as a matter of law." Conversely, Federal Rule 56 provided that "[t]he court shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." While, at first blush, these summary judgment standards seem similar, the different interpretations given to them by Florida courts and Federal courts amounted to a growing chasm.

26. Until the new summary judgment standard was adopted, Florida movants had to jump the almost insurmountable hurdle of essentially "proving a negative, *i.e.*, the non-existence of a genuine issue of material fact." *Hall v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966). Consistent

with this lofty standard, the prior standard also dictated that "[i]f the record reflects…the existence of any genuine issue of material fact, or the possibility of any issue, or if the record raises *even the slightest doubt that an issue might exist*, summary judgment is improper." *See, e.g., St. Pierre v. United Pacific Life Ins., Co.*, 644 So. 2d 1030, 1031 (Fla. 2d DCA 1994) (emphasis added).

27. Finally, under the old standard, a moving party was burdened with not only establishing their own case but also disproving the other party's defenses. *In re Amendments to Fla. Rule of Civ. Proc. 1.510*, 309 So. 3d 192, 193 (Fla. 2020) ("Florida courts have required the moving party conclusively 'to disprove the nonmovant's theory of the case in order to eliminate any issue of fact.") (citations omitted). These extremely stringent thresholds ultimately "unduly hindered the use of summary judgment in our state" for over half a century. *In re Amendments to Fla. Rule of Civ. Proc. 1.510*, 317 So. 3d 72, 75 (Fla. 2021).

28. Realizing that the historical summary judgment standard did not "best comport with the text and purpose of Rule 1.510," the Florida Supreme Court determined that adopting the federal standard was "in the best interest of [the State of Florida]." *In re Amendments to Fla. Rule of Civ. Proc. 1.510*, 309 So. 3d at 194. The purpose of the summary judgment procedure has traditionally been recognized as serving to avoid the cost and delay of unnecessary trials and to dispose of lifeless cases. *See, i.e., Petruska v. Smartparks-Silver Springs, Inc.*, 914 So. 2d 502, 503 (Fla. 5th DCA 2005) ("The great benefit derived from summary judgment is that it puts an end to useless and costly litigation where there is no genuine issue of material fact to present to a jury."); *Nat'l Airlines, Inc. v. Fla. Equip. Co. of Miami*, 71 So. 2d 741, 744 (Fla. 1954) ("The function of the rule authorizing summary judgments is to avoid the expense and delay of trials when all facts are admitted or when a party is unable to support by any competent evidence a contention of fact."). In considering such overarching purpose, the Florida Supreme Court found that the adoption of the federal standard better "secures the just, speedy, and inexpensive determination of every action" without inappropriately trespassing upon fundamental and traditional processes for determining the rights of litigants. *In re Amendments to Fla. Rule of Civ. Proc. 1.510*, 309 So. 3d at 194.

29. Under Florida's revised summary judgment standard, trial courts are to apply what generally mirrors a directed verdict standard. *See, e.g., Hammer v. Slater*, 20 F.3d 1137, 1141 (11th Cir. 1994) ("[T]he non-moving party must either point to evidence in the record or

present additional evidence 'sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency.'") (citations omitted). More specifically, a movant in Florida no longer has any duty to negate the opposing party's defenses or denials. Instead, the burden of a moving party is much more aligned to their burden at trial. "[T]he burden on the moving party may be discharged by 'showing' . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325. "[I]f the nonmoving party must prove 'X' to prevail at trial, the moving party at summary judgment can either produce evidence that 'X' is not so or point out that the nonmoving party lacks the evidence to prove 'X.'" *Bedford v. Doe*, 880 F.3d 993, 996-97 (8th Cir. 2018). Once a moving party satisfies said burden, the burden then shifts to the nonmoving party, who must establish the existence of a triable issue via qualified, competent evidence.

30. It is critical to comprehend what constitutes a "genuine issue of material fact" when applying the *Celotex* trilogy and its progeny. "An issue of fact is 'material' if it is a legal element of the claim under applicable substantive law which might affect outcome of the case." *Allen v. Tyson Foods*, 121 F.3d 642, 646 (11th Cir. 1997) (citations omitted). An issue of fact "is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." *Id*. (citations omitted). Trial courts are tasked with viewing all evidence and factual inferences drawn therefrom in the light most favorable to the nonmoving party and to ultimately determine whether that evidence could reasonably sustain a jury verdict. *Id*.

31. In reviewing an application for summary judgment, trial courts are only to consider the record as identified in subdivision (c). Said materials include portions of the record in the case that represent either sworn testimony[2] or admissions.[3] Trial courts may not consider other materials, nor can they consider testimony at the summary judgment hearing. *See., e.g., Nichols v. Preiser*, 849 So. 2d 478, 481 (Fla. 2d DCA 2003); *First North American Nat'l Bank v. Hummel*, 825 So. 2d 502, 504 (Fla. 2d DCA 2002) ("[D]ocuments [that] were not authenticated or supported by an affidavit or other evidentiary proof" should not have been considered on summary judgment motion).

32. Rule 1.510 does not require that a party seeking summary judgment wait for the conclusion of all discovery to pursue the remedy. Instead, subsection (d) affords a responding

[2] This may be in the form of sworn deposition testimony, sworn answers to interrogatories and affidavits submitted in support or in opposition to the motion.

[3] Admissions may come either through the pleadings in the file or through admissions that are effectuated under Rule 1.370 regarding requests for admissions.

party the ability to argue that it needs additional time "to obtain affidavits or declarations or to take discovery" to present facts essential to justify its opposition. Nonmovants seeking additional time should not make such applications, however, when they have been dilatory in seeking or taking advantage of discovery opportunities. *See., e.g., Martins v. PNC Bank, NA*, 170 So. 3d 932, 936-37 (Fla. 5th DCA 2015) ("[I]f the non-moving party does not act diligently in completing discovery or uses discovery methods to thwart and/or delay the hearing on the motion for summary judgment, the trial court is within its discretion to grant judgment even though there is discovery still pending).

33. Finally, the revised Rule 1.510 places the onus on litigants to provide clear and concise arguments establishing their entitlement to relief. First, the parties' supporting factual positions must be filed well before the hearing, not at the last minute. Second, each party must specifically identify particular parts of the record, establishing that a fact cannot be or is genuinely disputed. "A party seeking summary judgment always bears the initial responsibility of informing the [trial] court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. "The nature of this responsibility varies, however, depending on whether the legal issues, as to which the facts in question pertain, are ones on which the movant or the nonmovant would bear the burden of proof at trial." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). Where the movant bears the burden of proof at trial, "that party must show affirmatively the absence of a genuine issue of material fact: it must support its motion with credible evidence […] that would entitle it to a directed verdict if not controverted at trial." *Id*. (citations omitted). For issues on which the movant does not bear the burden of proof, "the moving party simply may show there is an absence of evidence to support the nonmoving party's case." *Id*. (citations omitted). Parties not fulfilling their pleading burdens under Rule 1.510 should expect to fail.

THE LAW

Race Discrimination under Chapter 760

34. Under the Florida Civil Rights Act of 1992 (FCRA), which is codified in sections 760.01 to 760.11, Florida Statutes, employees are protected from discrimination based on their race or ethnicity. Specifically, the FCRA protects employees against discriminatory job termination as well as on-the-job discrimination. *See* § 760.10, Fla. Stat.

35. Moreover, a long-standing rule of statutory construction in Florida recognizes that if a state law is patterned after a federal law on the same subject, the Florida law will be accorded "the same construction as given to the federal act in the federal courts." *State v. Jackson*, 650 So. 2d 24, 27 (Fla. 1995). Therefore, the FCRA is interpreted in conformity with Title VI of the federal Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000d et seq.; in conformity with Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e, et seq.; in conformity with 42 U.S.C.A. § 1981 and § 1983; and in consideration of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

36. Because Florida courts have recognized that the FCRA is patterned after Title VII, federal case law on Title VII applies to FCRA claims. *See Hall v. Marion County Board of County Commissioners*, 236 So. 3d 1147 (Fla. 5th DCA 2018). Likewise, any change to federal case law on Title VII interpretation necessitates a change in the interpretation of the FCRA. *See Carter v. Health Mgmt. Assoc.*, 989 So. 2d 1258, 1262 (Fla. 2d DCA 2008) ("Florida courts follow federal case law when examining FCRA retaliation claims.").

Plaintiffs' Race Discrimination Claims

37. In the context of claims for employment discrimination based on race or ethnicity, the necessary minimum elements that a plaintiff must show are that (1) he is a member of a particular race or ethnicity, (2) that he is a "qualified" individual, and (3) that he suffered the impact of discrimination because of his race or ethnicity. *Goldsmith v. Jackson Memorial Hosp. Public Health Trust*, 33 F. Supp. 2d 1336 (S.D. Fla. 1998); *Terrell v. USAir*, 132 F.3d 621, 624, 8 A.D. Cas. (BNA) 529 (11th Cir. 1998).

38. Race discrimination consists of an action that violates the following provisions of the FCRA, which state as follows:

> (1) It is an unlawful employment practice for an employer:
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.
> (b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

§ 760. 10, Fla. Stat.

39. Indeed, the means by which a plaintiff must go about showing employment discrimination is somewhat complex. *See Sheppard v. Sears, Roebuck & Co.*, 391 F. Supp. 2d 1168,1177 (S.D. Fla. 2005). For example, race discrimination may be established by either direct evidence of discriminatory intent, statistical analysis showing that racism is "a pattern and practice" of the organization, or by circumstantial evidence meeting the test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1549 (11th Cir. 1986).

40. To establish a prima facie case using direct evidence, a plaintiff must present "evidence, that, if believed, proves [the] existence of [a] fact without inference or presumption." *Id* (citations omitted); *see also Washington v. Sch. Bd. of Hillsborough Cnty.*, 731 F. Supp.2d 1309, 1317 (M.D. Fla. 2010). Stated differently, "[o]nly the most blatant remarks, whose intent could be nothing other than to discriminate . . . constitute direct evidence." *Carter v. City of Miami*, 870 F.2d 578, 582, (11th Cir. 1989).

41. Also, plaintiffs can bring pattern and practice claims for discrimination when there is a reasonable cause to believe that "any person or group of persons is engaged in a pattern or practice" of discrimination and that "discrimination was the company's standard operating procedure." *Cox*, 784 F.2d at 1549 (citations omitted). In such cases, the plaintiff may prove a pattern or practice claim "through a combination of strong statistical evidence of disparate impact coupled with anecdotal evidence of the employer's intent to treat the protected class unequally." *Mozee v. American Commercial Marine Service Co.*, 940 F.2d 1036, 1051 (7th Cir. 1991). In addition, "direct evidence of an intent to discriminate" may be used to show a pattern or practice claim for discrimination. *Mathis v. Wachovia*, 509 F. Supp. 2d 1125 (N.D. Fla. 2007), aff'd, 255 Fed. Appx. 425 (11th Cir. 2007).

42. Another available avenue for plaintiffs to show racial discrimination in their place of employment is by showing that their work environment was racially hostile. For such claims, the employee must prove five elements: (1) that he is a member of a protected class; (2) that he was subjected to unwelcome racial harassment; (3) that the harassment was based on his race; (4) that the harassment was severe or pervasive enough to alter the terms and conditions of his employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for the environment under a theory of either vicarious or direct liability. *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir.2002).

43. If there is no direct evidence, the plaintiff can still establish a prima facie case using circumstantial evidence. *Sheppard*, 391 F. Supp 2d at 1177. In such cases, under *McDonnell Douglas*, the plaintiff has to demonstrate that (1) he is a member of a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) he was replaced by a person outside of his protected class or was treated less favorably than a similarly-situated individual outside of his protected class. *Maynard v. Board of Regents of the Division of Universities of the Fla. Dep't of Educ.*, 342 F.3d 1281, 1289 (11th Cir.2003). By demonstrating all required elements, the plaintiff creates an inference that the employer acted with discriminatory intent. *Id*.

44. In the same context, it should be also noted that "to prove adverse employment action . . . an employee must show a *serious and material* change in the terms, conditions, or privileges of employment." *Anderson v. United Parcel Serv., Inc.*, 248 F.App'x 97, 100 (11th Cir. 2007) (emphasis in original). "[T]he employee's subjective view of the significance and adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances." *Id.*

45. If the plaintiff proves a prima facie case of discrimination, the burden then shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for taking the adverse action. *McDonnell Douglas*, 411 U.S. at 802. Indeed, an "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." *Nix v. WLCY Radio/Rahall Commc'n*, 738 F.2d 1181, 1187, 35 Fair Empl. Prac. Cas. (BNA) 1104, 34 Empl. Prac. Dec. (CCH) P 34575 (11th Cir. 1984).

46. In determining whether the employer's stated reason for taking the adverse employment action was legitimate and non-discriminatory, "the proper inquiry is not whether the employer's reason for an adverse employment action is correct, but rather, whether the employer reasonably believed the employee committed the infraction which led to the adverse employment action." *Sheppard* at 1182 (citations omitted). An employer's reason is not pretextual when the employer, in good faith, believes that the employee engaged in misconduct, regardless of whether or not the employee in fact did. *Chaney v. Southern Ry. Co.*, 847 F.2d 718, 723, 47 Fair Empl. Prac. Cas. (BNA) 124, 46 Empl. Prac. Dec (CCH) P 38054 (11th Cir. 1988).

47. Whenever the defendant has met its intermediate burden to show a legitimate, nondiscriminatory reason for its employment decision, the burden shifts back to the plaintiff to show that the defendant's stated rationale is pretextual. *McDonnell Douglas*, 411 U.S. at 804. This burden is met by establishing a pretext by the preponderance of the evidence. *Id*. This can be demonstrated in several different ways, such as by directly persuading the factfinder that a discriminatory reason more likely motivated the employer or by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1528 (11th Cir. 1997); *see also Jackson v. State of Alabama State Tenure Comm'n*, 405 F.3d 1276, 1289 (11th Cir. 2005).

48. The plaintiff can also show pretext by presenting evidence of a deviation from a company policy as circumstantial evidence of discrimination, "especially where the rules were bent or broken to give a non-minority [employee] an advantage." *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 644 (11th Cir. 1998); *Berg v. Florida Dept. of Labor and Employment Sec., Div. of Vocational Rehabilitation*, 163 F.3d 1251, 1255 (11th Cir. 1998) (suggesting that failure to adhere to or inconsistent application of policies may be circumstantial evidence of discrimination where there is a showing that the policies were applied to others).

49. Ultimately, however, proving the employer's reason for the adverse action was merely a pretext often turns upon the presentment of sufficient evidence that the employee was "treated less favorably than any similarly situated employees" who are not members of the protected class. *Clark v. Huntsville City Bd. of Educ*., 717 F.2d 525, 528 (11th Cir. 1983).

Retaliation under Chapter 760

50. Under the Florida Civil Rights Act, it is an unlawful employment practice to discriminate against any person because that person has opposed any statutorily unlawful practice or because that person has made a charge, testified, assisted, or participated in any manner in the investigation, proceeding, or hearing of such a practice. § 760.10(7), Fla. Stat.

51. Accordingly, an employer may not retaliate against an employee because the employee has opposed an unlawful employment practice. *Carter v. Health Mgmt.t Associates*, 989 So. 2d 1258, 1262-63 (Fla. 2d DCA 2008). In addition, the law protects employees' proceedings and activities that occur in conjunction with or after filing a formal charge. *Id.*

52. Retaliatory claims under the FCRA are analyzed in the same familiar manner as retaliation claims under Title VII of the Civil Rights Act. *Jackson v. Kleen 1, LLC*, 238 So. 3d 378 (Fla. 3d DCA 2017). The employee first must establish a prima facie case of retaliatory discharge, then the burden shifts to the employer to establish a legitimate business reason for the adverse action, and if it does so, the employee then bears the burden of establishing that the proffered reason was pretextual. *St. Louis v. Florida Intern. Univ.*, 60 So. 3d 455, 459 (Fla. 3d DCA 2011).

53. Accordingly, to establish a prima facie retaliation case under Chapter 760, the employee must demonstrate (1) that he engaged in statutorily protected activity, (2) an adverse employment action, and (3) a causal connection between the participation in the protected expression and the adverse action. *Village of Tequesta v. Luscavich*, 240 So. 3d 733, 738 (Fla. 4th DCA 2018); *Jackson v. Kleen 1, LLC*, 238 So. 3d 378, 380 (Fla. 3d DCA 2017) (internal citations omitted).

54. In addition, to show causation solely through temporal proximity in a retaliation action, the time between the protected activity and the adverse action must be, without more, very close. *Avila v. Childers*, 212 F. Supp.3d 1182, 1189-90 (N.D. Fla. 2016). When there is no other evidence to demonstrate causation in a retaliation action other than temporal proximity, if there is a substantial delay between the protected expression and the adverse action, the complaint of retaliation fails as a matter of law. *Id*. (Eight-month delay between a public employee's protected activity of complaining about national origin discrimination and the employee's termination was insufficient to raise an inference of retaliation through temporal proximity to establish a causal connection, as required to support the former employee's retaliation action under Title VII and the Florida Civil Rights Act.)

55. Still, "while adverse events occurring long after the statutorily protected activity was exercised generally do not support a finding of causation, the mere lack of close temporal proximity does not sound the death knell of plaintiff's retaliation claim." *Saridakis v. South Broward Hosp. Dist.*, 681 F. Supp. 2d 1338, 1355 (S.D. Fla. 2009). In such cases, the retaliation claim requires additional proof that the desire to retaliate was the "but-for" cause of the challenged employment action. *Avila*, 212 F. Supp.3d at 1189. Also, to be liable for retaliation, the decision-maker must be aware of the employee's statutorily protected activities. *Saridakis*, 681 F. Supp. 2d at 1342.

56. It should also be noted that the U.S. Supreme Court changed the causation standard for Title VII retaliation claims in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). *Palm Beach Cnty. School Board v. Wright*, 217 So. 3d 163, 165 (Fla. 4th DCA 2017). In *Nassar*, the court held that "[t]he text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under § 2000(e)3(a) must establish that his or her protected activity was a but-for-cause of the alleged adverse action by the employer." *Nassar*, 570 U.S. at 362 (emphasis added). "Title VII retaliation claims must be prove[n] according to traditional principles of but-for causation, not the lessened causation test" for status-based discrimination. *Id*. Because "Florida courts follow federal case law when examining FCRA retaliation claims[,]" the change to Title VII retaliation claims required a change to the causation standard for FCRA retaliation claims. *Wright*, 217 So. 3d at 165 (citation omitted). Accordingly, the FCRA must be given the same construction as Title VII post-*Nassar*. *Id*. Therefore, the *Nassar* case sounded the end of the "wholly unrelated" standard from *Olmsted v. Taco Bell Corp.*, 141 F.3d 1457, 1460 (11th Cir. 1998).[4]

ANALYSIS

57. Cases brought under section 760 are often defined as "fact-specific in the extreme." *Speedway SuperAmerica, LLC v. Dupont*, 933 So. 2d 75, 84 (Fla. 5th DCA 2006). Accordingly, this Court had to examined carefully the voluminous record evidence provided by both parties in support of their respective positions during the pendency of this matter. In evaluating the underlying motions for summary judgment, the Court also construed any factual disputes in a light most favorable to Plaintiffs.

58. In this case, the four Plaintiffs contend that they were subjected to disparate treatment based on their race. Such claims can be proven using direct evidence (requiring no inference or presumption) or circumstantial evidence. *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1286 (11th Cir.2000).

59. Defendant claimed that Kozmas Smith could not establish a prima facie case of discrimination because he did not suffer any adverse employment action. In support of this position, Defendant argued that most of Smith's complaints were not "materially adverse as viewed by a reasonable person in the [same] circumstances." Def.'s Mot., p. 16 (quoting *Doe v.*

[4] *Olmsted* had required the causal link under Title VII to "be construed broadly" and "a plaintiff merely ha[d] to prove that the protected activity and the negative employment action [were] not completely unrelated." *Olmsted*, 141 F.3d at 1460 (citation omitted).

Dekalb County Sch. Dist., 145 F.3d 1441, 1449 (11th Cir. 1998)). Specifically, according to Defendant, two of the six write-ups that Smith received while working for Defendant had no consequences to him and could not be the basis of his alleged discrimination claim.[5] As to the remaining four warnings, Defendant asserted that Smith had ultimately admitted to the underlying conduct.

60. Defendant also argued that the alleged surveillance that Jagers was conducting on the black employees did not result in any changes to Smith's employment conditions and could not be interpreted as an adverse action. In support of its position that the increase in Plaintiffs' workload could not be considered an adverse employment action and was instead an "ordinary tribulation of the workplace, Plaintiff referred to *MacLean v. City of St. Petersburg*, 194 F. Supp. 2d 1290, 1299 (M.D. Fla. 2002). Defendant also disputed Plaintiff's allegations that Jagers made frequent discriminatory remarks and claimed that such were not sufficiently severe and pervasive to alter the terms and conditions of Plaintiff's employment or to create a discriminatorily abusive working environment.

61. Finally, while agreeing that Kozmas Smith's ultimate termination constituted an adverse action, Defendant argued that the City had legitimate reasons to fire him. Specifically, Defendant justified Kozmas Smith's termination with his multiple disciplinary warnings and with the fact that he had recorded other employees without their knowledge and submitted such recordings as evidence in the underlying case. Defendant also alleged that Kozmas Smith had intentionally destroyed the City's Kubota, which was another legitimate ground for his termination.

62. With respect to Smith's Retaliation claim under Chapter 760, Defendant asserted that the record showed that Plaintiff did not engage in any protected activity because his complaints to Defendant were too vague, and neither during the August 27, 2019, meeting with Defendant nor in the February 2020 letters, did he report any race discrimination or retaliation. Instead, as Defendant contested that throughout his complaints, Plaintiff simply had taken issue with Jagers' overall behavior towards his subordinates and had expressed a general dislike of his supervisory style.

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[5] Of note, the Court recognizes that a single write-up cannot form the basis of a discrimination claim when no other consequences result. *Austin v. FL Hud Rosewood, LLC*, 791 Fed.Appx. 819, 825 (11th Cir. 2019). Here, however, this assertion appears to be a somewhat situation "Catch-22" because Defendant also argues that Smith's ultimate termination was justified because of, among other things, his record of "multiple disciplinary warnings."

63. Defendant also argued that Plaintiff's retaliation claim must fail because Smith could not establish any causal connection between his protected activity, if *any*, and any subsequent adverse action. In essence, Defendant argued that there was no proof that Jagers was even aware of the August 27, 2019, meeting nor of the letters sent in February 2020. Similarly, according to Defendant, there were legitimate, nondiscriminatory, and nonretaliatory reasons for Defendant's actions. In particular, Defendant relied on record evidence, suggesting that Plaintiff had admitted some of the conduct that resulted from his multiple employment warnings. Defendant also asserted that it was undisputed that Plaintiff had destroyed the property of the City and that he had recorded other employees without their knowledge, which was one of the primary reasons for his ultimate termination. [Ex. 1, K. Smith 2d Dep. at 6:16 – 7:7]. Lastly, Defendant claimed that Plaintiff Kozmas Smith could not establish that the reasons for his termination were just a pretext.

64. In opposition to the Motions, Plaintiff provided contradictory evidence suggesting that when the new supervisory positions in the street department were announced, he was not given the opportunity to apply because the jobs were never advertised. [Ex. 87, S. Smith's Aff., ¶ 5; Ex. 88, S. Smith's Dep., p. 26-27, 36-37; Ex. 89, L. Green's Aff., ¶ 5; Ex. 85, K. Smith's Aff., ¶ 5; Ex. 86, K. Smith's Dep., p. 42-45]. Plaintiff also claimed that there was compelling evidence that Jagers was indeed not qualified for the job but was promoted because of his personal connections with other managing personnel. [Ex. 94, Bland's Sworn Statement, p. 9-10, 19-20; Ex. 95, Reeves' Sworn Statement, p. 12-15, 21; Ex. 96, Hand's Sworn Statement, p. 16-18].

65. Plaintiff also offered evidence that when Jagers took over the supervising position, he began to treat the African-American employees differently than the white employees, yelled at them, subjected them to verbal abuse, and specifically targeted the black workers in order to provoke them and create intolerable work conditions for them. [Ex. 104, Anderson's Sworn Statement, p. 7-8; Ex. 101, Norwood's Sworn Statement, p. 6; Ex. 152, Ash's Dep., p. 7-9; Ex. 153, Bell's Dep., p. 8-9]. Some of the evidence of the claimed differential treatment provided by Plaintiff consisted of information about different rules with respect to bathroom use, permission to purchase breakfast and to take lunch breaks, heavier workload, distinct working conditions and time expectations for the completion of the assigned jobs, abusive supervisory methods, different uniform requirements and discipline practices, and numerous claims of intimidation, threats, and derogatory comments made regarding the black

employees to others. Kozmas Smith further alleged that his ultimate termination for recording employees was a pretext and that he believed that it was permitted to record employees because there was a sign on the front door that warned visitors that there was "audio and video recording in [the] building." [Ex. 1; Smith 2d Dep. 6:16-7:7]. He also claimed that white employees have been known to have recorded others in the past, but they were not terminated for the same alleged misconduct. [Id.]

66. In its Motion for Summary Judgment against Shane Smith, Defendant asserted that neither of Plaintiffs had ever been disciplined for using the restrooms at the shop, although Defendant admitted that Jagers had asked his crew to use facilities closer to where they were working instead of returning to the shop to do so. [Exh. 7, Jagers Dep. 13:19-25; Exh. 1, Pl. Dep. 61:11; Exh. 6, Jenkins Dep. 43:2-7.] In addition, Defendant claimed that Shane Smith did not suffer any discipline or reprimand due to his confrontation with Jagers in May of 2019 and that Jager has subsequently apologized to him. Defendant also took the position that Jagers did not discriminate against the black employees by giving them the option to leave an hour earlier if they skipped lunch; that the alleged excessive workload, surveillance, and preventing related employees from working together were not adverse employment actions, and that the alleged disparaging remarks made by Jagers could not be construed as discriminatory. In addition, Defendant asserted that the only Employment Warning Notice that Shane Smith received on May 13, 2020, could not form the basis for his underlying claims because it did not inflict any economic harm to him and did not result in any material changes to his job. Similarly, Defendant argues that there was no competent evidence of any instances when Smith was held to different standards than the white employees or had received less favorable treatment.

67. Regarding Smith's claim for retaliation, Defendant asserted that the record showed that this Plaintiff did not report or oppose any unlawful action and that his only protected activity was the August 12, 2019, meeting, where Kozmas Smith allegedly recorded the conversations unlawfully. Defendant further disputed that said meeting and the subsequent letter that Shane Smith wrote on May 25, 2020, could form the basis for his race discrimination claims as Smith had simply accused Jagers of disciplining him because of a "personal vendetta and retaliation." [Exh. 10, Letter to Philput.]

68. In opposition to the motion, Shane Smith presented evidence that shortly after the department was split into two crews and Jagers was promoted as one of the Team Leaders,

Jagers was put in charge of a bigger crew, which included two more white employees than the crew given to Green. [Ex. 87, S. Smith's Aff., ¶ 9; Ex. 89, L. Green's Aff., ¶ 9; Ex. 85, K. Smith's Aff., ¶ 9; Ex. 86, K. Smith's Dep., p. 51]. Plaintiff also presented evidence suggesting that once Jagers took over the supervisory position, he became hostile and aggressive with him and the other African-American employees. [Ex. 87, S. Smith's Aff., ¶ 10; Ex. 88, S. Smith's Dep., p. 46-47, 85; Ex. 97, S. Smith's Dep., 4/19/2022, p. 16; Ex. 89, L. Green's Aff., ¶ 11; Ex. 90, L. Green's Dep., p. 25, 40- 42, 63-66, 79-80; Ex. 98, L. Green's Dep., 4/19/2020, p. 18; Ex. 85, K. Smith's Aff., ¶ 10; Ex. 86, K. Smith's Dep., p. 36-37, 62-64, 67-68, 98-99, 108-109, 155; Ex. 99, K. Smith's Dep., 4/19/2022, 7 p. 31-32; Ex. 100, K. Smith's Answers to Interrogatories, p. 1-12; Ex. 152, Ash's Dep., p. 7-9]. He further relied on record evidence concerning separate events that suggested that he was treated differently than the white employees and was subjected to racial hostility mainly at the hands of Jagers. [Ex. 87, S. Smith's Aff., ¶ 21; Ex. 88, S. Smith's Dep., p. 76-80].

69. As to the specific allegations of adverse employment actions raised by Plaintiff Ervin Green, Defendant provided evidence suggesting that Green was not qualified for the accounting position for which he applied in 2016 because he did not have the required "minimum of three years of experience in the governmental accounting sector either as an employee of a government or as an external auditor of governmental entities." [Ex. 15; Skibba Application at 16426 – 16431]. The evidence presented by Defendant also indicated that instead of Green, Defendant hired for the position Kim Skibba, who was a white female and a Certified Public Accountant. In addition, according to Defendant, even if Plaintiff could establish that he was qualified for the same accounting position, there was no evidence that the decision to hire Skibba was made based on race. [Ex. 1, Green Dep. 42:19 – 43:8].

70. Defendant further disputed Green's claim that he did not receive a raise in 2018 after Bland wrote a recommendation for such due to his outstanding work performance. Instead, Defendant presented contradicting evidence that Green's pay was indeed increased on April 19, 2018. [Ex. 3, at 377]. Defendant further took issue with Plaintiff's allegations that his unfavorable performance evaluations conducted on June 3, 2019, October 7, 2019, and December 6, 2019, the issuance of the September 13, 2019, employee warning notice, and the meeting with Jenkins after Plaintiff's failure to attend the City mandatory luncheon constituted adverse employment actions.

71. Additionally, Defendant argued that Green could not establish a prima facie case of retaliation because he did not engage in any protected activity. Specifically, according to Defendant, the 2016 meeting with Philput was timed-barred, and the February 2020 letters failed to report with specificity any race discrimination, retaliation, or other activity that was prohibited under Chapter 760. Thus, Defendant claimed that Plaintiff could not establish a causal connection for his retaliation claim since the only adverse action that he had allegedly suffered was his demotion in October 2019, which occurred prior to the February 2020 letters. Defendant also claimed that it had legitimate and nondiscriminatory reasons to demote Green due to his inability to supervise his crew members and his refusal to discipline them when necessary. Finally, Defendant asserted that there was no record evidence to show that its reasons for the alleged adverse action were pretextual and inconsistent with Defendant's business decision and that such was made after allowing Plaintiff adequate time to prove his ability to lead and his ultimate failure to do so.

72. In opposition to the Motion, Plaintiff provided evidence that at the time of his transfer to the department, he had to take a cut in pay, while Jagers, who was also transferred, received a raise. [Ex. 91, E. Green's Aff., ¶ 3; Ex. 92, E. Green's Dep., p. 59]. Plaintiff further presented evidence that around February 2019, he discovered that he was considered a threat to Jagers' advancement with Defendant. [Ex. 91, E. Green's Aff., ¶ 4; Ex. 92, E. Green's Dep., p. 65]. According to the evidence provided by Plaintiff, to justify promoting Jagers over the entire street department, Defendant intentionally set him up for failure during the period when he was a team leader. [Ex. 94, Bland's Sworn Statement, p. 13-16; Ex. 96, Hand's Sworn Statement, p. 7-9, 16-18]. Some of the instances of disparate treatment, as pointed out by Plaintiff, were frequent criticism of his work performance, increased surveillance and discipline actions of him and his crew, and larger workloads with fewer workers compared to Jagers and his team. (Id.)

73. Plaintiff further claimed that Jagers' wife, Carrie Jagers, a white female, was hired as a Payroll Clerk instead of Plaintiff, although she did not have his qualifications. [[Ex. 91, E. Green's Aff., ¶ 6; Ex. 92, E. Green's Dep., p. 43- 44]. He also presented evidence that he received several unfavorable work performance evaluations, which subsequently resulted in a decrease in his pay rate. [Ex. 91, E. Green's Aff., ¶ 7; Ex. 92, E. Green's Dep., p. 37-38; Ex. 51, Performance Evaluations]. He also included evidence that he was written up for uniform violations while white employees, such as Patrick Farron, were not disciplined for allegedly

similar misconduct. [Ex. 91, E. Green's Aff., ¶ 10; Ex. 137, E. Green's Answers to Interrogatories, p. 2-3, 12, 23-24]. Ervin Green further claimed that once he obtained his commercial driver's license, he did not receive a pay raise, while the white employees in the department, including Robert Ware, received a raise for obtaining their CDL. [Ex. 91, E. Green's Aff., ¶ 11; Ex. 92, E. Green's Dep., p. 67-68, 79-82].

74. Aside from the general allegations of disparate treatment asserted by all Plaintiffs in this case, such as being held to different standards and subjected to intimidation, threats, and derogatory comments, Landon Green also alleged he was personally impacted by the following three adverse actions: not being hired in the Storm Water Department; receiving a warning for "not being in the right place at the right time," and; several unfavorable work performance evaluations. [Ex. 2, Pl. 's Int. Ans. 3.]

75. Defendant disputed Landon Green's assertions and argued that he did not suffer any adverse employment actions. In support of its position, Defendant relied on evidence that indicated that the decision not to hire Green for the Storm Water department was made by the Civil Service Board and was due to his lack of a commercial driving license. [Ex. 1, Green Dep. 85:5-7.] In relation to Green's specific allegation that he was held to different standards than the white employees, Defendant claimed that this was not an accurate statement and reasoned that Green was never formally disciplined for the alleged failure to be fully dressed in City attire on any specific occasion. [Exh. 1, Pl. Dep. 38:8-10; Exh. 12, Employee Warning Notice.] Nevertheless, the record confirmed that Green had received at least an initial verbal warning from Jager regarding his uniform violation and that he was subsequently written up for "not reporting to work after clocking in." [Ex. 2, Employee Warning Notice.] Defendant also disputed Green's claim that the white employees were not disciplined for the same alleged misconduct and took issue that Green had not provided sufficient details to substantiate this accusation. Defendant also argued that Green had failed to bring his specific concerns to the attention of Jagers, Jenkins, or the HR Director Philput.

76. In opposition to Defendant's Motions, Plaintiffs provided record evidence that indicated that Jagers had made numerous cruel comments about the black employees and had instructed others to target only blacks. [Ex. 110, Callahan's Sworn Statement, p. 9; Ex. 111, Pariss' Sworn Statement, p. 4-6; Ex. 154, Brown's Dep., p. 7-8]. According to the evidence presented by Plaintiffs, Jagers specifically had made aggressive comments to the black

employees in order to provoke them and give him an excuse to get rid of them and replace them with white employees. [Ex. 104, Anderson's Sworn Statement, p. 7-8; Ex. 101, Norwood's Sworn Statement, p. 6; Ex. 152, Ash's Dep., p. 7-9]. Additionally, the evidence relied upon by Plaintiffs suggested that Jager assigned the black employees to more dangerous jobs and expected them to work in hazardous conditions while refusing to place the white employees in the same unsafe environment. [Ex. 87, S. Smith's Aff., ¶ 23; Ex. 105, LeBlanc's Sworn Statement, p. 8; Ex. 112, J. Smith's Sworn Statement, p. 5; Ex. 89, L. Green's Aff., ¶ 22; Ex. 85, K. Smith's Aff., ¶ 20; Ex. 86, K. Smith's Dep., p. 102-105, 144-146; Ex. 100, K. Smith's Answers to Interrogatories, p. 5, 10, 20; Ex. 91, E. Green's Aff., ¶ 38; Ex. 137, E. Green's Answers to Interrogatories, p. 13-16, 19-23, 32-35; Ex. 17, Letter, 2/12/2020; Ex. 18, Letter, 2/17/2020; Ex. 154, Brown's Dep., p. 9]. Lastly, Plaintiffs showed that the two open positions previously held by Plaintiffs Kozmas Smith and Shane Smith were subsequently filled up with white employees and that Defendant had consistently hired only white employees ever since. [Ex. 91, E. Green's Aff., ¶ 49; Ex. 132, E. Green's Dep., 4/19/2022, p. 22-23; Ex. 89, L. Green's Aff., ¶ 47; Ex. 133, L. Green's Dep., 4/19/2022, p. 18; Ex. 105, LeBlanc's Sworn Statement, p. 14].

77. After taking the depositions of Randy Anderson, Kevin Callahan, Jeremy Heath, and Stephen Parris in March 2023, Defendant submitted its Second Supplement to his Motions and claimed that said depositions bolstered its prior arguments and confirmed that Plaintiffs were not treated differently than the white employees, but were simply unhappy with some of the changes in the department. Additionally, according to Defendant, to the extent Jagers was an unpleasant supervisor, the evidence showed that his behavior was directed towards all employees regardless of their race.

78. In particular, Defendant disputed that there was any competent evidence that Jagers had ever made cruel comments about the black employees and given instructions to others to target only black workers or that he had told the black employees that they could not return to the shop during the day but did not issue the same order to the white employees such as Patrick Farnon, Robert Ware, Adam McLellan, and the boom truck operator Brent. Defendant also disputed the Plaintiffs' claims that the black employees were required to leave the shop immediately after the morning meeting, while the white employees could remain in the shop to chat with Jagers, and that Jagers frequently yelled at the Plaintiffs and subjected them to hostile

body language indicating physical aggression, but that he did not speak to the white employees in the same manner.

79. In their Supplemental Response and Memorandum in Opposition to Defendant's Second Supplemental Motion for Summary Judgment, Plaintiffs cited additional parts of the four witnesses' depositions and argued that their testimony was consistent with their earlier sworn statements indicating that black employees were treated differently than the white employees. For example, Plaintiff provided additional parts of Anderson's deposition, where he claimed that Jagers was more "relaxed" with the white employees, gave the white employees more freedom, and that the black employees were working while Jagers socialized with the white employees. [Ex. 160, Anderson's Dep., p. 17-19]. As Plaintiff additionally argued, during his deposition, Anderson had also confirmed that he had observed Jagers attempting to provoke Plaintiffs Kozmas Smith and Shane Smith to get them to "lose their cool." [Ex. 160, Anderson's Dep., p. 15]. Plaintiffs also relied on Anderson's testimony describing an incident involving Plaintiff Kozmas Smith wearing inappropriate footwear, and evidence concerning a second incident with Plaintiff Shane Smith. [Ex. 160, Anderson's Dep., p. 15-17]. In support of its position, Plaintiffs also relied on the additional testimony of Parris, where she had stated that she had witnessed Jagers issuing an order to another employee to target only the black employees, including Plaintiffs Kozmas Smith and Shane Smith, but none of the white employees. [Ex. 163, Parris' Dep., p. 5-7, 10].

80. After carefully examining said depositions and viewing the disputed facts in the light most favorable to Plaintiff, the Court agrees with Plaintiffs' arguments on said issue. In reaching its conclusion, the Court also considered the remaining evidence provided at the summary judgment stage, including the sworn statements of any other witnesses, whose depositions Defendant had chosen not to take.

CONCUSION

81. The parties do not dispute that Plaintiffs are part of a protected class. Moreover, Defendant indicated that it does not disagree that Plaintiffs were indeed qualified individuals.

82. The Court further finds that Plaintiffs presented sufficient evidence that they suffered some form of adverse employment action such as, but not limited to, failure to promote, low work evaluations, multiple disciplinary warnings, pay decreases, demotions, suspensions without pay, different work conditions, and employment termination. Accordingly, based on the

evidence in the record as seen in the light most favorable to the non-moving party, the Court finds that Plaintiffs satisfied their initial burden of proof with respect to the first, second, and fourth elements under *McDonnell Douglas*.

83. As discussed above, Defendant also took issue with Plaintiffs' alleged comparators and argued that they were not similarly situated in all material respects. Of note, as it relates to this specific argument, the record and the applicable law confirm that it is due to be rejected as not being a viable basis for granting summary judgment. Indeed, a plaintiff may withstand this stage of the litigation even in the absence of any adequate comparator. *Rioux v. City of Atlanta*, 520 F.3d 1269, 1281 (11th Cir.2008) (holding that the plaintiff established a prima facie case of racial discrimination when he did not present evidence of a comparator but presented other circumstantial evidence that was sufficient); *see also Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1264 (11th Cir.2010) (stating that the circumstantial evidence necessary to present a Title VII case of discrimination under *McDonnell Douglas* is "flexible and depend[s] on the particular situation" (citations omitted)); *cf. Burke–Fowler v. Orange County, Fla.*, 447 F.3d 1319, 1325 (11th Cir. 2006) (affirming the district court's granting of summary judgment because the plaintiff "failed to establish valid comparators *and presented no other circumstantial evidence* suggesting racial discrimination" (emphasis added)). Accordingly, when the circumstantial evidence presented by the plaintiffs raises a reasonable inference that the employer discriminated against them, even in the absence of similarly situated comparators, summary judgment is improper. More importantly, the record here shows that Plaintiff provided relevant evidence related to their alleged comparators and met their initial burden as to this third element as well.

84. Accordingly, by establishing all necessary elements under *McDonnell Douglas*, Plaintiffs demonstrated a prima facie case for discrimination and created a presumption that Defendant acted with discriminatory intent.

85. The Court also recognizes Defendant's extremely light burden in rebutting Plaintiffs' prima facie case under the *McDonnell Douglas* analysis, which only requires it to produce evidence of "legitimate, nondiscriminatory reasons" for the alleged adverse employment actions. 450 U.S. at 216. To succeed on this intermittent burden, it is not even necessary for Defendant to persuade the Court that it was actually motivated by its proffered reasons. Instead, the production of any evidence that raises a genuine issue of fact as to whether

the defendant discriminated against plaintiffs would suffice. In the instant matter, the Court also finds that Defendant met its burden of production.

86. Nevertheless, when conflicts arise between the facts evidenced by the parties, the Court is required to credit the nonmoving party's version. Therefore, in evaluating Plaintiffs' accusations, the trial court must consider the totality of the circumstances, keeping in mind that "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Oncale v. Sundowner Offshore Serv., Inc*, 523 U.S. 75, 81–82 (1998).

87. Indeed, in a typical case alleging disparate treatment, after the plaintiff establishes that he was disadvantaged in fact by some employment decision or practice, the crux of the matter becomes "what was the motive" behind it and was there an intent to discriminate along any legally impermissible lines such as the person's race or gender? *See Katz v. Dole*, 709 F.2d 251, 255 (U.S. 1983). Here, the evidence presented by Plaintiffs suggested that Jagers' actions toward Plaintiffs might have been at least partially motivated by their race. There is also evidence indicating that Defendant was at least constructively notified of the alleged disparate treatment and racially hostile environment during the events discussed above but that it failed to take any corrective actions.

88. Accordingly, the Court finds that under the totality of the circumstances in the instant case, Plaintiffs presented sufficient evidence that Defendants' articulated reasons for the alleged adverse actions were simply a pretext for discrimination.

89. In addition, it should be noted that "[the Eleventh Circuit has] recognized that the *McDonnell Douglas* framework is not the only way to evaluate an employment discrimination claims at the summary judgment stage. *See Smith v. Lockheed-Martin Corp*., 644 F.3d 1321, 1328 (11th Cir. 2011). In *Smith*, the court held that a plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent. *Id*. A triable issue of fact exists if the record, viewed in a light most favorable to the plaintiff, presents a "convincing mosaic" of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." *Hill v. SunTrust Bank*, 720 F. App'x 602, 605 (11th Cir. 2018) (internal quotations omitted); see also *Herron-Williams v. Alabama State University*, 805 Fed. Appx. 622, 630 (11th Cir. 2020).

90. Therefore, under the facts discussed above, the Court concludes that a reasonable jury *might* take the view that the events at issue here did not paint a picture of a desperate treatment and racially hostile work environment and that neither of the Plaintiffs experienced discrimination or retaliation during their employment with Defendant. The jury could also determine that Plaintiffs were not treated differently than any of the other employees and that to the extent Jagers was an unpleasant supervisor, his behavior was directed towards all employees regardless of their race.

91. Nevertheless, a reasonable juror can also take a contradictory view of the evidence and conclude that Defendant's alleged behavior reached the level of discrimination and retaliation and was motivated by Plaintiffs' race.

92. Based on the totality of the forgoing circumstances, the Court finds that Plaintiffs presented sufficient evidence in the record to withstand Defendant's motions for summary judgment.

Therefore, it is

ORDERED AND ADJUDGED that Defendants' Motions for Summary Judgment are hereby **DENIED**.

DONE AND ORDERED this **Monday, September 11, 2023**, in Panama City, Bay County, Florida.

03-2020-CA-001566-CA 09/11/2023 04:40:03 PM

James J. Goodman, Judge
03-2020-CA-001566-CA 09/11/2023 04:40:03 PM

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