No. 15-_____

In The
Supreme Court of the United States

PETER J. PASKE, JR.,

Petitioner,

v.

JOEL FITZGERALD, individually and in his official capacity as Chief of Police of the City of Missouri City, Texas; THE CITY OF MISSOURI CITY, TEXAS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@uw.edu

MARGARET A. HARRIS
BUTLER & HARRIS
1007 Heights Boulevard
Houston, TX 77008
(713) 526-5677

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

McDonnell Douglas Corp. v. Green established a common method of analyzing evidence of an unlawful discriminatory motive. If a plaintiff establishes a prima facie case of discrimination, the defendant must articulate a legitimate, non-discriminatory purpose for the disputed action; where the defendant has done so, the plaintiff has the burden of demonstrating that the proffered purpose was a pretext for discrimination. This Court has repeatedly explained that the burden of establishing a prima facie case is "not onerous."

United States Postal Service Board of Governors v. Aikens held, in the context of a case which had gone to trial, that once a defendant articulates such a nondiscriminatory purpose, it no longer matters whether the plaintiff established a prima facie case; instead, the court should proceed to resolve the ultimate issue of discrimination *vel non*.

The questions presented are:

(1) Does the rule in *Aikens* apply to the evaluation of a discrimination claim at summary judgment?

(2) Is a plaintiff claiming discrimination required to prove, as an element of a prima facie case, that he or she was treated less favorably than a "nearly identical" "similarly situated" individual who is not a member of the protected class, a Fifth Circuit requirement which courts have characterized as "stringent," "strict," and "demanding?"

PARTIES

The parties to this proceeding are set forth in the caption.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Petitioner Peter J. Paske, Jr., respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on May 4, 2015.

OPINIONS BELOW

The May 4, 2015, opinion of the court of appeals, which is reported at 785 F.3d 977 (5th Cir. 2015), is set out at pp. 1a-17a of the Appendix. The April 7, 2014, opinion of the district court, which is unofficially reported at 2014 WL 1366552 (S.D.Tex. April 7, 2014), is set out at pp. 18a-53a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on May 4, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment provides in pertinent part: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides in pertinent part:

> It shall be 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....

Section 703(m) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(m), provides:

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

STATEMENT

Legal Background

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), established one method of evaluating evidence of discrimination in employment. If the plaintiff establishes a prima facie case of discrimination, the

burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the disputed employment action. The function of the prima facie case is to compel the employer to articulate such a reason. Once the employer does so, the burden returns to the plaintiff to establish that the proffered reason is a pretext for discrimination. Although the *McDonnell Douglas* approach originated in a Title VII case, it has been widely used in other types of cases involving claims of an unlawful motive.

Because of the large volume of litigation involving allegations of invidious discrimination or other unlawful motives, this Court has repeatedly granted certiorari to clarify the application of the *McDonnell Douglas* methodology.[1] In subsequent decisions the Court made clear that the burden of establishing a prima facie case should not be onerous, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981), and that "[t]he method suggested in *McDonnell Douglas* ... was never intended to be rigid, mechanized, or ritualistic." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

---

[1] *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978).

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983), explained that, if at trial an employer offers a non-discriminatory explanation for the action at issue, the court should *not* consider whether the plaintiff had established a prima facie case. Instead, *Aikens* held, the court should proceed directly to the final step of the *McDonnell Douglas* approach and decide whether the proffered reason was a pretext for unlawful discrimination. 460 U.S. at 715-16.

McDonnell Douglas and *Aikens* were decided when Title VII claims were to be adjudicated at bench trials. Since the adoption of the 1991 Civil Rights Act, however, Title VII cases (and almost all other types of discrimination claims) are tried to juries. Today most discrimination claims, prior to any trial, are subject to motions for summary judgment.

In the wake of these developments, the lower courts have faced and become divided about two interrelated recurring issues: (1) Does *Aikens* apply to summary judgement? and (2) If not, is a plaintiff claiming discrimination required to prove, as an element of a prima facie case, that he or she was treated less favorably than a "nearly identical" "similarly situated" individual who is not a member of the protected class? This case presents a classic example of both of those related issues.

The questions presented are of great practical importance. The two well-established Fifth Circuit precedents described below, working in tandem,

dictate that a complaint alleging discrimination or retaliation will at summary judgment usually be dismissed for want of a prima facie case unless the plaintiff can find a fellow worker (from outside the protected class at issue) who both is "similarly situated" and engaged in "nearly identical" conduct. In the absence of such a doppelganger – and they are usually absent – courts will grant summary judgment without ever deciding whether an employer's proffered explanation was a pretext for discrimination. As the Fifth Circuit candidly explained in this case, in that circuit a plaintiff must *both* demonstrate that the employer's reason was a pretext for discrimination *and* establish a prima facie case. App. 14a n.8. These Fifth Circuit precedents thus generally exclude workers without doppelgangers from the protections of Title VII and other federal anti-discrimination laws and, in the case of government employees, from the protections of the Equal Protection Clause.

Factual Background

From 1996 to 2011, Peter Paske was an officer with the Police Department of the City of Missouri City, Texas. Paske had "graduated at the top of his class from a basic peace officer school," been promoted to Sergeant, recognized as Officer of the Year, and "was respected and liked by many of his colleagues,

who described him as a good officer and supervisor." App. 19a.[2]

In 2009, the City appointed Joel Fitzgerald as its Chief of Police. Fitzgerald had been an officer at the Philadelphia Police Department, and shortly after his appointment he hired as one of the captains a former colleague from Philadelphia, Geneane Merritt. There was some controversy about that appointment, and about Merritt's competence once she began work in Missouri City.[3] Fitzgerald and Merritt are black; Paske, who was one of the officers who objected to Merritt's conduct, is white. App. 2a, 19a, 21a.

In July 2011, Merritt received permission to take three days of funeral leave for a funeral in Philadelphia. Police officials discovered that Merritt had not actually gone to Philadelphia, however, and Fitzgerald promised the City Manager that he would look into the matter. But Fitzgerald never did so; instead he adopted "a generous interpretation of the Department's funeral leave policy" under which an officer given days off to attend an out-of-town funeral had no obligation to actually use that time to attend the funeral. App. 3a. Shortly after this problem came to light, Merritt notified Fitzgerald that she wished to be demoted to Lieutenant; Merritt and Fitzgerald insisted that the voluntary demotion was not related to the funeral issue. App. 2a-3a, 21a-22a.

---

[2] Record on Appeal ("ROA") 2752, 2789, 2865.

[3] ROA 1619, 2084, 3073, 3182-87.

The events leading to Paske's dismissal began at a July 20, 2011 supervisors' meeting that Paske and Chief Fitzgerald attended. Paske asked Fitzgerald whether Merritt would be demoted; the Chief took the question very badly. "The Chief said he wasn't announcing that information at this time [and] turned red...." App. 23a. A few minutes later, Fitzgerald lashed out at Paske, demanding to know why Paske had not run a different staff meeting held earlier that day. Paske, who had attended that earlier meeting, indicated he did not believe he was the officer who was supposed to run the meeting. The Chief vehemently disagreed. App. 5a, 23a. There was no contention that anything had gone wrong at the earlier meeting. Other events at the supervisors' meeting are in dispute.

The next day Fitzgerald suspended Paske, in part[4] for purportedly having disobeyed an order to run the earlier meeting. A week later, Fitzgerald demoted Paske.[5] App 6a. The announcement of the demotion led to further issues. The city contends that during the meeting at which Paske was told of the demotion, he "became visibly tense, [his] face became red, [he] tightened [his] body and fists, and began

[4] The City also asserted that "Paske's reference to his superior officers as 'she' and 'he' was disrespectful...." App. 5a n.2. There was conflicting testimony regarding whether Paske had acted disrespectfully. ROA 1772, 2994.

[5] Paske was demoted from the position of patrol sergeant to patrol officer, with a substantial reduction in pay. App. 6a.

shaking [his] legs." App. 6a. "Officer Paske provided testimony contradicting these allegations." App. 7a n.4. Based on Paske's alleged emotional reaction to the demotion, Fitzgerald ordered Paske to take part in a form of counseling at the Texas Medical Center. App. 25a. In August, "a high-ranking officer in the Department called the [Medical Center], ... alleging that Paske had lied to the ... counselor about when he said he was taking a week's vacation." App. 7a. That information was false; "[t]he vacation time was pre-approved by Paske's immediate supervisor." App. 7a n.5. But based on this inaccurate report, the counselor decided to order that Paske submit to a drug test.

On August 17, a day that Paske was not scheduled to be on duty, he had an appointment with the counselor. Paske had arranged for his mother-in-law to watch his three children and three of their young cousins until he returned from the appointment; two of those involved were infants. That morning, unfortunately, Paske's mother-in-law was hit by a car and taken to the hospital. Paske arranged for a neighbor to briefly care for the children so that he could keep the appointment. App. 25a. The counselor notified Paske that he was to call an Assistant Chief and then report to the police department for a drug test. Paske called the Assistant Chief, and explained that as a result of the accident he could not come into the department at that time because he needed to care for the children. The Assistant Chief indicated no

objection.[6] The Assistant Chief reported Paske's explanation to Chief Fitzgerald. App. 8a, 26a.

A few minutes later, Fitzgerald called Paske and demanded that he come into the police station within one hour. Paske was not needed for any police duties, and Paske contends that Fitzgerald issued the order merely to have an excuse to fire Paske, because Fitzgerald knew that Paske could not obey without endangering the children. Paske again explained that his mother-in-law had been hit by a car, and that he could not come to the station right then because he had to care for the children. Fitzgerald hung up and immediately decided to fire Paske, supposedly because he did not believe the (now undisputed) story that Paske's mother-in-law had been injured. App. 26a. The next day, Paske took and passed a drug test and brought the results to the City. He was informed that he had been dismissed, and that the Department therefore did not want the test results.

Proceedings Below

In 2012, Paske filed this action in state court, alleging that he had been discriminated against and ultimately fired because of his race. Paske asserted claims under Title VII of the Civil Rights Act of 1964 and under 42 U.S.C. § 1983. The defendants removed the case to federal court.

---

[6] ROA 1296.

After a period of discovery, the defendants moved for summary judgment. Both at the time of Paske's dismissal, and during discovery, the defendants offered a number of nondiscriminatory explanations for their decisions to discipline and ultimately dismiss Paske. Paske in turn adduced several types of evidence that these proffered explanations were just pretexts for discrimination. Some evidence proved that certain of the City's explanations were based on factual assertions that the defendants knew were false.[7] Paske also proved that Fitzgerald had assumed that Paske's mother-in-law had not been injured, and that Paske was thus lying, without bothering to check Paske's statement with first responders or the hospital;[8] a trier of fact might infer Fitzgerald did not bother to do so because he was just looking for an excuse to dismiss Paske. Paske offered evidence that an Assistant Chief had made false statements about Paske to officials at the Texas Medical Center,[9] as well as testimony that there was no order directing him to run the disputed police department meeting.[10] Paske proffered evidence of other situations in which white officers had been treated less favorably than black officers.[11] Finally, Paske offered testimony directly disputing assertions by Fitzgerald and others

---

[7] ROA 3018-19, 3042-44.

[8] ROA 2737-38.

[9] App. 7a and n.5.

[10] ROA 3004-06.

[11] ROA 1772, 2909-10.

regarding how Paske had acted at the meetings of July 20 and July 27.[12] All of that evidence, Paske argued, was more than sufficient to demonstrate that the defendants' proffered explanations were merely a pretext for discrimination.

The district court granted summary judgment to the defendants without ever deciding whether Paske had sufficient evidence of pretext. Instead, applying well-established Fifth Circuit precedents, the district court held that the defendants were entitled to summary judgment solely because Paske had failed to establish a prima facie case. In that circuit, if a plaintiff cannot satisfy the demanding standard for a prima facie case – the first element of the *McDonnell Douglas* analysis – a court need not decide whether the plaintiff has sufficient evidence to prove that he or she was the victim of unlawful discrimination, the last step of that analysis.

The district court specifically noted that in the Fifth Circuit, in order to establish a prima facie case of discrimination, "an employee must demonstrate that ... 'he was treated less favorably because of his membership in that protected class than were similarly situated employees who were not members of the protected class, under nearly identical circumstances.'" App. 44a-45a (quoting *Lee v. Kansas City S. Ry. Co.*, 574 F.3d 253, 259 (5th Cir. 2009)). "The 'nearly identical' standard required to show that a

[12] See *supra*, p.7; ROA 2772, 2995-96.

comparator employee is similarly situated is *stringent*, and excludes employees with 'different responsibilities, different supervisors, different capabilities, different work rule violations, or different disciplinary records.'" App. 45a (emphasis added) (quoting *Beltron v. Univ. of Tex. Health Sci. Ctr. at Houston*, 837 F.Supp.2d 635, 642 (S.D.Tex. 2011)). The district court granted summary judgment solely because Paske could not satisfy that standard; it reasoned that the black officers who were treated more favorably than Paske were not "similarly situated" under "nearly identical" circumstances.

> Plaintiff has not presented evidence sufficient to raise a genuine issue of material fact that "he was treated less favorably because of his [race] than were other similarly situated employees who were not [white], under nearly identical circumstances." .... Because Plaintiff has presented no evidence sufficient to establish a *prima facie* case of race discrimination under Title VII, Defendants are entitled to summary judgment.

App. 48a (quoting *Lee*). Having concluded that Paske did not establish a prima facie case, the district court did not consider whether the evidence of pretext was sufficient to permit a jury to find that the defendants' proffered reasons were pretexts for discrimination.

The Fifth Circuit affirmed on the same ground, again without reaching the pretext issue. A plaintiff alleging discrimination, the court of appeals insisted, was required to establish a prima facie case

by showing, inter alia, that "he was treated less favorably because of his membership in that protected class than were similarly situated employees who were not members of the protected class, under nearly identical circumstances." App. 14a (quoting *Lee v. Kansas City S. Ry. Co.*, 574 F.3d at 259). The court of appeals emphatically rejected Paske's suggestion that he could survive summary judgment merely by showing that the reasons offered by the City were pretexts for discrimination. "The cases Paske cites ... make abundantly clear that Paske must prove a prima facie case *as well as* pretext to succeed." App. 14a n.8 (emphasis in original).

The court of appeals also rejected Paske's argument that he could establish a prima facie case by proving pretext.

> That is not the law. First, Paske must establish a prima facie case by pointing to an appropriate comparator. Only then would Fitzgerald and the City have a duty to "offer an alternative non-discriminatory explanation for the adverse employment action." [*Lee*, 574 F.3d] at 259. And only after they provided that explanation would the pretext issue become relevant.

Id. Under Fifth Circuit precedent, the absence of "similarly situated" "nearly identical" non-white officers was, without more, fatal to Paske's claim. "Because Paske failed to adduce evidence that a comparator was treated more favorably under nearly identical circumstances, he failed to establish a prima facie

case of race discrimination. Accordingly, we affirm the judgment of the district court regarding Paske's race discrimination claim." App. 15a. The court of appeals declined to decide whether Paske had sufficient evidence of pretext, because that was simply irrelevant; under its view of the law, even if Paske demonstrated that the City's reasons were pretexts for discrimination, his claim would still fail because he did not *also* establish a prima facie case. App. 14a n.8.

REASONS FOR GRANTING THE WRIT

I. THERE IS AN ENTRENCHED CONFLICT REGARDING WHETHER *AIKENS* APPLIES AT SUMMARY JUDGMENT

This case presents a longstanding conflict about the application of this Court's decision in *United States Postal Service Board of Governors v. Aikens.* In *Aikens*, following a bench trial of the plaintiff's claim of racial discrimination in employment, the parties devoted much of their arguments on appeal to the issue of whether the plaintiff had established a prima facie case. This Court held that whether the plaintiff had done so was irrelevant.

> Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a *prima facie* case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination *vel*

> *non*.... Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff."

460 U.S. at 713-15 (quoting *Burdine*, 450 U.S. at 253).

The courts of appeals are sharply divided regarding whether *Aikens* should be applied at summary judgment; specifically, there is a circuit split regarding whether, when (as is almost always the case) a defendant has articulated a non-discriminatory reason for a disputed action, a plaintiff must nonetheless establish a prima facie case (the rule in the Fifth Circuit), or need only offer sufficient evidence that the defendant's proffered reason was a pretext for discrimination (the rule in four other circuits).

In *Hague v. University of Texas Health Science Center at San Antonio*, 560 Fed.Appx. 328 (5th Cir. 2014), the Fifth Circuit expressly recognized that "there is a circuit split with respect to whether the holding in *Aikens* applies at the summary judgment stage or only applies once there is a trial on the merits." 560 Fed.Appx. at 335 n.8 (noting decisions in the Sixth, Seventh, Eighth, and District of Columbia Circuits applying *Aikens* at summary

judgment, and a decision in the Fourth Circuit refusing to do so).[13]

Because a number of circuits, including the Fifth Circuit, apply an avowedly "stringent" standard for establishing a prima facie case, the applicability of *Aikens* to summary judgment is a question of enormous practical importance.

A. Four Circuits Hold That *Aikens* Applies To Summary Judgment

The Sixth, Seventh, Eighth and District of Columbia Circuits hold that *Aikens* governs summary judgment.

The leading case applying *Aikens* to summary judgment is *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 493-94 (D.C.Cir. 2008) (internal quotations marks omitted).

> [B]y the time the district court considers an employer's motion for summary judgment ... the employer ordinarily will have asserted a legitimate, nondiscriminatory reason for the challenged decision.... [Therefore,] the question whether the employee actually made out a prima facie case is no longer relevant and thus disappear[s] and drops out of the picture.

---

[13] See 560 Fed.Appx. at 340 (Dennis, J., dissenting) ("Many of our sister circuits have ... found that *Aikens* applies on appeal from summary judgment.").

520 F.3d at 493-94. "In this case the employer ... asserted a legitimate, non-discriminatory reason for the adverse employment action.... Under *Aikens* and related Supreme Court precedents, the question whether Brady actually made out a prima facie case is therefore irrelevant." *Id.* at 494-95.

> Lest there be any lingering uncertainty, we state the rule clearly: In a Title VII disparate-treatment suit, where ... an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not – *and should not – decide whether the plaintiff actually made out a prima facie case*.... Rather, in considering an employer's motion for summary judgment ... in those circumstances, the district court must resolve one central question: Has the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee....

520 F.3d at 494 (emphasis in original).

Since 2008 the District of Columbia Circuit has regularly applied *Brady* to summary judgment in a wide variety of circumstances. *Adeyemi v. District of Columbia*, 525 F.3d 1222, 1226 (D.C.Cir. 2008) (American With Disabilities Act); *Hairston v. Vance-Cooks*, 773 F.3d 266, 272 (D.C.Cir. 2014); *Jones v. Bernanke*, 557 F.3d 670, 678 (D.C.Cir. 2009) (age discrimination and retaliation claims). Most recently the District of Columbia Circuit applied *Brady* in a case decided less

than ten days before the filing of the petition in this case. *Allen v. Johnson*, 2015 WL 4489510 at *3 (D.C.Cir. July 24, 2015).

The Sixth Circuit took the same approach in *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000).

> *Aikens* reminds us that once a defendant "responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection," whether or not the plaintiff made out a prima facie case "is no longer relevant."…. Rather, by producing evidence of its nondiscriminatory reason, a defendant has moved the inquiry to the ultimate factual question of whether its action against the plaintiff was discriminatory or not, and plaintiff thereafter enjoys the opportunity to rebut that reason and show discrimination. At this point, a district court *cannot resolve the case by returning to the prima facie stage.*

206 F.3d at 661 (emphasis added; quoting *Aikens*).

> This case simply requires that the rule from *Aikens* be applied in the pre-trial context…. *Aikens* … mandates that at least with respect to the employer's proffered nondiscriminatory reason, the prima facie case is no longer relevant – it has "dropped out" of the inquiry. The plaintiff thus enjoys the full opportunity to show that reason to be pretextual as part of the third stage of *McDonnell Douglas.*

Id. at 661. The Sixth Circuit thus reversed the district court decision granting summary judgment, without consideration of whether the plaintiff had established a prima facie case, reasoning that to inquire into the existence of a prima facie case "would mistakenly apply[ ] legal rules which were devised to govern the basic allocation of burdens and order of presentation of proof in deciding this ultimate question." *Id.*; see *Wixson v. Dowagiac Nursing Home*, 87 F.3d 164, 170 (6th Cir. 1996) ("We need not decide whether the plaintiffs made out prima facie cases.... *Aikens* ... discussed the respective burdens of the parties and the task of the trial court where there is a full-dress trial. Our task is to apply the same rules in a case where ... the district court granted summary judgment.").

The Seventh Circuit applied the same rule in *Lindemann v. Mobil Oil Corp.*, 141 F.3d 290 (7th Cir. 1998).

> [I]t is unnecessary for this Court to determine whether a plaintiff has established a prima facie case where a defendant has advanced a legitimate, nondiscriminatory reason for its action.... "Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant."

141 F.3d at 296 (quoting *Aikens*); see *Smith v. American Federation of State, County and Municipal Employees, Illinois Council 31*, 247 Fed.Appx. 804, 808

(7th Cir. 2007) ("Although the district court's conclusion on the prima facie element is not entirely clear from its opinion, we need not resolve this dispute because Council 31 has come forward with a legitimate explanation for Smith's termination."); *Isbell v. Allstate Ins. Co.*, 418 F.3d 788, 796 (7th Cir. 2005) (quoting *Lindemann*).

The Eighth Circuit applied *Aikens* to a summary judgment motion in *Riser v. Target Corp.*, 458 F.3d 817 (8th Cir. 2006).

> The parties have spent a great deal of time ... disagreeing about whether Riser established a prima facie case.... However, ... we need not devote extensive analysis to the subject.... "[W]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." ... Thus, we need not indulge the parties' disputes about ... whether Riser met his burden in establishing a prima facie case....

458 F.3d at 820-21 (quoting *Aikens*); see *Stewart v. Indep. School Dist. No. 196*, 481 F.3d 1034-43 (8th Cir. 2007) ("the level of proof required to show causation is less at the prima facie stage than at the final stage of the *McDonnell Douglas* analysis. As such, if an employer has articulated a legitimate reason for its actions, it is permissible for courts to presume the existence of a prima facie case and move directly to the issue of pretext and the determinative issue of

causation when bypassing the prima facie case analysis leads to clarity in framing the issues under review."); *Wagner v. Gallup, Inc.*, 788 F.3d 877, 886 (8th Cir. 2015) (quoting *Stewart* and *Riser*). In *Hilde v. City of Eveleth*, 777 F.3d 998, 1004 (8th Cir. 2015), the Eighth Circuit reversed the award of summary judgment on the ground that there was sufficient evidence of pretext, without ever deciding if the plaintiff had established a prima facie case.

B. Three Circuits Hold That *Aikens* Does Not Apply To Summary Judgment

The Fourth, Fifth, and Tenth Circuits hold that *Aikens* does not apply to summary judgment, and all have expressly disagreed with the District of Columbia Circuit decision in *Brady*.

In *Hague*, the Fifth Circuit insisted that is own precedents barred application of *Aikens* to summary judgment.

> [T]his court has repeatedly interpreted *Aikens* to apply *only* after a trial.... There is no authority in this Circuit that would allow the employee's burden of establishing a prima facie case to be extinguished simply because an employer exercises its right to challenge the prima facie case and also proffers a legitimate, nondiscriminatory reason for its decision.... [W]e are bound by our earlier precedent ... which applies *Aikens* to cases that have been tried on the merits.

560 Fed.Appx. at 334-35 (emphasis added); see *id.* at 338 (King, J., concurring) ("whether correctly or not, this circuit's precedent requires the district court to determine, at the summary judgment stage, whether the plaintiff has established a prima facie case under *McDonnell Douglas*.").

The Fifth Circuit invited this Court to resolve this issue, noting that "until the Supreme Court ... , rules otherwise, we follow our precedent and hold that the district court [in assessing a motion for summary judgment] must address whether [the plaintiff] established a prima facie case of retaliation." *Id.* at 335.[14]

Two other Fifth Circuit decisions expressly disagreed with the District of Columbia Circuit decision in *Brady. Stallworth v. Singing River Health System*, 469 Fed.Appx. 369, 372 (5th Cir. 2012) ("Stallworth urges us to follow *Brady* ... and pretermit the issue whether she has made the requisite prima facie case showing given that Singing River has offered legitimate, nondiscriminatory reasons for the challenged employment actions. She cites no precedent in this circuit for following *Brady*, and we decline to do so."); *Atterberry v. City of Laurel*, 401 Fed.Appx. 869, 871 n.1 (5th Cir. 2010) ("Atterberry argues we should follow *Brady*, which reasoned that once an employer has asserted a legitimate, non-discriminatory

[14] Judge Dennis, in a dissenting opinion, argued that *Aikens* does apply to summary judgment. 560 Fed.Appx. at 339-41.

reason for its decision, the district court should not decide whether the plaintiff made out a *prima facie* case, but instead should proceed immediately to decide whether a reasonable jury could find the employer intentionally discriminated. Whatever the merits of *Brady* may be, our rule of orderliness requires that we follow our own precedent.").

The Fourth Circuit disagreed with *Brady* in *Pepper v. Precision Valve Corp.*, 526 Fed.Appx. 335, 336 n.* (4th Cir. 2013). "We decline Pepper's invitation to adopt the holding of *Brady*.... See *Stallworth* ... (declining to adopt *Brady*); *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1202 n.12 (10th Cir. 2008) (declining to adopt *Brady*....)." In *Curry v. E-Systems, Inc.*, 72 F.3d 126, 1995 WL 729512 (4th Cir. Dec. 11, 1995), the Fourth Circuit offered a specific explanation of why it believed *Aikens* does not apply to summary judgment.

> *Aikens* ... not[ed] that once an employment discrimination action has proceeded through bench trial to conclusion without having been dismissed for lack of a prima facie case, the question whether a prima facie case ... was properly made out "is no longer relevant." Because at this point the district court has before it all the evidence needed to decide the discrimination issue *vel non*, it should proceed directly to that question. The difference of course is that the question on summary judgment is not whether on all the evidence the claim has been established on the merits, but whether there is a

> submissible issue of material fact for trial. To answer that, the first logical inquiry is whether the plaintiffs' proffered evidence would make out a prima facie case, hence survive a motion to dismiss, before ever getting to any possible "pretext" issues.

1995 WL 729512 at *2 n.2 (quoting *Aikens*).

The Tenth Circuit also insists that *Aikens* does not apply to summary judgment.

> Some may question whether we should pause to assess the existence of a prima facie case when, at summary judgment, an employer puts forth a nondiscriminatory reason for its adverse action. *See, e.g., ... Brady....* Although we readily concede that the prima facie case requirement may sometimes prove a sideshow to the main action of pretext, this court has indicated that it reserves the right to undertake each step of the Supreme Court's *McDonnell Douglas* framework.... And, so long as *McDonnell Douglas* remains the law governing our summary judgment analysis, it seems to us that if an employee fails to present even the limited quantum of evidence necessary to raise a prima facie inference that his or her protected activity led to an adverse employment action, it can become pointless to go through the motions of the remainder of the *McDonnell Douglas* framework to determine that [an] unlawful [motive] was not at play.

Hinds v. Sprint/United Mgmt. Co., 523 F.3d 1187, 1202 n.12 (10th Cir. 2008); see *Paup v. Gear Products, Inc.*, 327 Fed.Appx. 100, 113 (10th Cir. 2009) ("Some have criticized *McDonnell Douglas* as improperly diverting attention away from the real question posed [by anti-discrimination statutes] – whether discrimination actually took place – and substituting in its stead a proxy that only imperfectly tracks that inquiry.... But *McDonnell Douglas* of course remains binding on us."); *Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d 1220, 1226 (10th Cir. 2000) ("the three-part *McDonnell Douglas* burden-shifting analysis is limited to the summary judgment context [and does not apply] [o]nce there has been 'a full trial on the merits.... ' .... Because this case was decided on summary judgment, we review the district court's application of *McDonnell Douglas*.") (quoting *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 744 (10th Cir. 1991)).[15]

C. The Conflict Is Widely Recognized

The Fifth Circuit in *Hague* expressly noted the existence of this circuit split. Decisions in the Fourth, Fifth and Tenth Circuits expressly refuse to follow the decision of the District of Columbia Circuit in *Brady.*

---

[15] Several members of the Tenth Circuit have argued that *Aikens* should be applied at summary judgment. *Wells v. Colo. Dep't of Transp.*, 325 F.3d 1205, 1227-28 (10th Cir. 2003) (Hartz, J., writing separately); *MacDonald v. Eastern Wyoming Mental Health Center*, 941 F.2d 1115, 1122 (10th Cir. 1991) (Seth, J., concurring).

Seven district court decisions have recognized this circuit conflict.[16]

[16] *Mabry v. Capital One, N.A.*, 2014 WL 6875791 at *2 n.2 (D.Md. Dec. 3, 2014) ("Mabry appears to suggest that this Court adopt the approach taken by the United States Court of Appeals for the District of Columbia in *Brady* ... and not analyze whether she has made a prima face case once Capital One asserts a non-discriminatory basis for its employment action.... The Fourth Circuit has declined to follow that approach. See *Pepper*...."); *Jackson v. United Parcel Service*, 2013 WL 5525972 at *8 (N.D.Ala. Oct. 4, 2013) ("other circuits have ... concluded that in these cases the district court need not – and should not – decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas*.... But the Eleventh Circuit still honors the *McDonnell Douglas* framework...."); *Hailey v. Donahoe*, 2012 WL 4458451 at *6 nn.6, 11 (W.D.Va. July 30, 2012); *Daniels v. City of Canton, Mississippi*, 2011 WL 5040901 at *1 n.1 (S.D.Miss. Oct. 24, 2011) ("The court ... rejects plaintiff's argument that, under ... *Aikens* ... , as interpreted by the D.C. Circuit in *Brady* ... , the plaintiff is relieved of her burden of establishing a *prima facie* case where the defendant has articulated a legitimate non-discriminatory reason for the termination. *See Atterberry v. City of Laurel* ... (declining to follow *Brady*)."); *Stallworth v. Singing River Health System*, 2011 WL 2532473 at *3 (S.D.Miss. June 24, 2011; *Taylor v. Jotun Paints, Inc.*, 2010 WL 3720435 at *3 n.1 (E.D.La. Sept. 15, 2010); *Lewis v. Heartland Inns of America, L.L.C.*, 585 F.Supp.2d 1046, 1061 n.14 (S.D.Iowa 2008) ("the Tenth Circuit has acknowledged the new approach adopted by *Brady*, but has declined to follow its lead, finding utility in the prima facie examination. *Hinds*...."); *Turner v. Kansas City Southern Ry. Co.*, 622 F.Supp.2d 374, 393 n.30 (E.D.La. 2009) ("The requirement of a showing by the plaintiff of a *prima facie* case ... continues to be applied by all the Circuit Court of Appeals except for the District of Columbia.").

II. THERE IS A DEEPLY ENTRENCHED CONFLICT REGARDING WHETHER TO ESTABLISH A PRIMA FACIE CASE A PLAINTIFF MUST SHOW THAT A "SIMILARLY SITUATED" COMPARATOR IN "NEARLY IDENTICAL" CIRCUMSTANCES WAS TREATED MORE FAVORABLY

The courts below applied the well-established Fifth Circuit rule that, to establish a prima facie case a plaintiff must show that he or she "was treated less favorably because of his [or her] membership in [a] protected class than were other similarly situated employees who were not members of the protected class, under nearly identical circumstances." App. 13a, 45a (quoting *Lee*, 574 F.3d at 259). As the district court correctly noted, this is an avowedly "stringent" requirement. App. 45a.

The same requirement exists in the Eleventh Circuit. *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1286 (11th Cir. 2000). In *Bell v. Capital Veneer Works*, 2007 WL 245875 (11th Cir. 2007), the court of appeals upheld the dismissal of the plaintiff's claim because, having failed to identify a "nearly identical" comparator, she was unable "to satisfy all elements of her prima facie case." 2007 WL 245875 at *2. The lack of a prima facie case was fatal to the plaintiff's claim, despite evidence that the decisionmaker had earlier remarked "[i]f I could run the mill myself, I would fire everyone [sic] of these niggers." *Id.* at *2 n.5. See *Tomczyk v. Jocks & Jills Restaurants, LLC*, 198 Fed.Appx. 804, 809 (11th Cir. 2006) (discrimination

claim dismissed for want of a proper comparator despite "a slew of vulgar and harassing comments" by the plaintiff's supervisor "inflicted on [the plaintiff] because of race."); *Mack v. ST Mobile Aerospace Engineering, Inc.*, 195 Fed.Appx. 829, 838, 841 (11th Cir. 2006) (discrimination claim dismissed for want of a proper comparator even though "management directed racial derogatory words and jokes, such as 'boy,' 'nigger,' and the statement that 'you're the wrong fucking color,' toward the plaintiff.... and supervisors continued to display the [Confederate] flag.").

That same requirement for establishing a prima facie case is applied in the Fourth[17] and Seventh Circuits.[18] The Sixth Circuit has adopted a variant of the Fifth and Eleventh Circuits' prima facie case rule.[19]

Six circuits have this specific requirement for a prima facie case. The First Circuit has expressly

---

[17] *Ford v. General Electric Lighting, LLC*, 121 Fed.Appx. 1, 5 (4th Cir. 2005); *Cook v. CSX Transp. Corp*., 988 F.2d 507, 510 (4th Cir. 1993); *Moore v. City of Charlotte, NC*, 754 F.2d 1100, 1105-06 (4th Cir. 1985).

[18] E.g., *Filar v. Bd. of Educ. of City of Chicago*, 526 F.3d 1054, 1060 (7th Cir. 2008); *Atanus v. Perry*, 520 F.3d 662, 672-73 (7th Cir. 2008).

[19] E.g., *Wright v. Murray Guard, Inc*., 455 F.3d 702, 707 (6th Cir. 2006); *Driggers v. City of Owensboro, Ky*., 110 Fed.Appx. 499, 506 (6th Cir. 2004).

disapproved application of Eleventh Circuit precedents embodying this rule.

> [T]he [district] court ... followed the lead of the Eleventh Circuit and construed the prima facie requirement to call for a "show[ing] that ... the misconduct for which [the plaintiff] was discharged was nearly identical to that engaged in by an employee outside the protected class whom the employer retained."... [T]he district court's sequencing determination was in error, for the time to consider comparative evidence in a disparate treatment case is at the third step of the burden-shifting ritual, when the need arises to test the pretextuality *vel non* of the employer's articulated reason....

Conward v. Cambridge School Committee, 171 F.3d 12, 19 (1st Cir. 1999) (quoting *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1185 (11th Cir. 1984)).[20] Conversely, the Sixth Circuit has explicitly disapproved the First Circuit rule that evidence of more favorable treatment of a comparator need only be considered in showing pretext, and is not an essential element of a prima facie case. *Clayton v. Meijer, Inc.*, 281 F.3d 605, 609-10 (6th Cir. 2002).[21]

---

[20] *Kosereis v. Rhode Island*, 331 F.3d 207, 211 (1st Cir. 2003); *Fernandes v. Costa Brothers Masonry, Inc.*, 199 F.3d 572, 684 (1st Cir. 1999).

[21] Clayton urges this Court to adopt the standard articulated by the First Circuit in *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 19 (1st Cir.

(Continued on following page)

The Second Circuit requires only that a plaintiff, in order to establish a prima facie case, show that the disputed adverse action "occurred under circumstances giving rise to an inference of discrimination." *Graham v. Long Island Rail Road*, 230 F.3d 34, 38 (2d Cir. 2000). "A plaintiff *may* raise such an inference by showing that the employer ... treated him less favorably than a similarly situated employee outside his protected group," *id.* at 39 (emphasis added), but is not limited to that particular method of proof.

> Defendants are ... wrong in their contention that [a plaintiff] cannot make out a claim that survives summary judgment unless she demonstrates that the defendants treated similarly situated men differently.... Although her case would be stronger had she provided ... such evidence, there is no requirement that such evidence be adduced.

Back v. Hastings on Hudson Union Free School District, 365 F.3d 107, 121 (2d Cir. 2004).

The Third Circuit has also rejected the Fifth Circuit requirement. In *Marzano v. Computer Science*

> 1999).... [T]his Court has not adopted the formulation set forth by the First Circuit in *Conward*.... [T]he district court correctly held that the plaintiff must prove that he was either replaced by a person outside of the protected class or show that similarly situated, non-protected employees were treated more favorably.

281 F.3d at 609-10 (footnote omitted).

Corp., Inc., 91 F.3d 497 (3d Cir. 1996), the defendants argued that the standard for a prima facie case "encompasses the requirement that plaintiff show that *similarly situated* unprotected employees [were treated more favorably]." 91 F.3d at 510 (quoting brief for employer) (emphasis in opinion). The Third Circuit rejected that proposed requirement in language that aptly described the fatal flaw in the "nearly identical" standard.

> [W]e reject Defendants' argument because it would seriously undermine legal protections against discrimination. Under their scheme, any employee whose employer can for some reason or other classify him or her as "unique" would no longer be allowed to demonstrate discrimination inferentially, but would be in the oft-impossible situation of having to offer direct proof of discrimination.... [A]rguments as to the employee's uniqueness should be considered in conjunction with, and as part of, the employer's rebuttal – not at the prima facie stage.

91 F.3d at 510-11.

In *Bodett v. CoxCom, Inc.*, 366 F.3d 736 (9th Cir. 2004), "[t]he district court employed a *prima facie* test requiring [the plaintiff] to show that 'other similarly situated employees outside of the protected class were treated more favorably.'" 366 F.3d at 743-44. The Ninth Circuit held that the district court erred in limiting in that way the manner in which a plaintiff may establish a prima facie case. "A plaintiff may

show *either* that similarly situated individuals outside her protected class were treated differently *or* 'other circumstances surrounding the adverse employment action give rise to an inference of discrimination.'" *Id*. (emphasis in original) (quoting *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004)).

The Tenth Circuit has repeatedly rejected the position that a plaintiff must demonstrate the existence of a valid comparator in order to establish a prima facie case. In *Nguyen v. Gambro BCT, Inc.*, 242 Fed.Appx. 483 (10th Cir. 2007), the district court had applied that Eleventh Circuit standard, requiring the plaintiff to show that she was "treated less favorably than a person outside the protected group." 242 Fed.Appx. at 487. The Tenth Circuit expressly disapproved that standard for establishing a prima facie case.

> The district court erred ... in its articulation and application of prima facie case standards.... We held in *Kendrick* [*v. Penske Transp. Servs., Inc.*, 220 F.3d 1220 (10th Cir. 2000)] that the lower court committed error "in requiring [plaintiff] to show that [the employer] treated similarly-situated non-minority employees differently in order to [establish a prima facie case]." ... *see also English v. Colo. Dept. of Corrections*, 248 F.3d 1002, 1008 (10th Cir. 2001) ("[I]n disciplinary discharge cases ... a plaintiff does not have to show differential treatment of

> persons outside the protected class to meet the initial prima facie burden....").

242 Fed.Appx. at 488.

The District of Columbia Circuit has also rejected this requirement. In *Czekalski v. Peters*, 475 F.3d 360 (D.C.Cir. 2007), the district court had held that to establish a prima facie case a plaintiff "must demonstrate that she and a similarly situated person outside her protected class were treated disparately." 475 F.3d at 365. The District of Columbia Circuit disapproved that standard. "As we said in *George v. Leavitt* [407 F.3d 405 (D.C.Cir. 2005)], ... '[t]his is not a correct statement of the law.' 407 F.3d at 412." *Id*. "One method by which a plaintiff can satisfy [the prima facie case standard] is by demonstrating that she was treated differently from similarly situated employees who are not part of the protected class.... But this is not the only way." *George v. Leavitt*, 407 F.3d at 412.

III. THE DECISION OF THE COURT OF APPEALS IS CLEARLY INCORRECT

A. *Aikens* Applies To Summary Judgment

The logic of *Aikens* is completely applicable to the summary judgment context. The practical purpose of the establishment of a prima facie case is to compel an employer to offer a non-discriminatory explanation for a disputed action. But once an employer has done so – and in litigation today employers almost invariably do so – whether the plaintiff established a prima facie case simply does not matter. The ultimate

question in any such case is whether the employer engaged in intentional discrimination, and in most cases that would be shown by proving that the employer's proffered reason was a pretext for discrimination. If a plaintiff has adduced enough evidence that a reasonable jury could infer the existence of such pretext, there is simply no justification for granting summary judgment, or even for inquiring into whether that plaintiff had met a circuit's standards for establishing a prima facie case.

Any distinction between the standard governing a *post*-trial motion for judgment as a matter of law – clearly governed by *Aikens* – and the standard applicable to a *pre*-trial motion for summary judgment would pose problems of constitutional magnitude under the Seventh Amendment. In a case in which a party would otherwise be entitled to a jury trial, summary judgment is constitutionally permissible only on the theory that it merely keeps from the jury the same cases in which a post-trial motion for judgment as a matter of law would have to be granted. If a plaintiff's evidence of pretext would be sufficient post-trial to defeat a motion for judgment as a matter of law, nothing *more* may be required of that plaintiff pre-trial to withstand summary judgment.

The problem is not merely procedural; it has very serious practical consequences. The Fifth Circuit practice significantly narrows the prohibition in Title VII. Title VII forbids taking action against an individual "because of" his race. A plaintiff establishes that Title VII was violated by proving that an

employer's proffered explanation was a pretext for discrimination. The fatal flaw in the Fifth Circuit rule is that it requires a plaintiff to do two things, both to prove that an employer acted with an unlawful purpose and to establish a prima facie case. The court of appeals highlighted the meaning of the Fifth Circuit's interpretation of Title VII when it emphatically insisted that the circuit's cases "make abundantly clear that Paske must prove a prima facie case *as well as* pretext to succeed." App. 14a n.8 (emphasis in original).

B. The Requirement of A "Nearly Identical" "Similarly Situated" Comparator Is Inconsistent With This Court's Decisions Regarding A Prima Facie Case

The Fifth Circuit standard for the creation of a prima facie case – that a plaintiff identify some "similarly situated" worker outside the protected class who was "nearly identical" and yet treated more favorably – is palpably inconsistent with the decisions of this Court.

This Court has repeatedly emphasized that the standard for establishing a prima facie case is "not onerous."[22] But the Fifth Circuit requirement is

[22] *Young v. United Parcel Service, Inc*., 135 S.Ct. 1338, 1354 (2015); *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 667

(Continued on following page)

exactly that. Decisions in that Circuit – including the district court decision in this very case – correctly characterize the Fifth Circuit requirement as "stringent."[23] Other decisions in that circuit similarly describe the requirement as "strict"[24] and "demanding."[25] And so it is in practice. In the last two years the Fifth Circuit has considered 28 cases in which the plaintiff attempted to meet this standard. In 25 of those cases the court of appeals concluded that the plaintiff had failed to find a similarly situated comparator under nearly identical circumstances, and therefore dismissed the case for failure to establish a prima facie case. App. 54a-57a. The problem is not that such doppelgangers exist but are being treated the same as plaintiffs, but that those doppelgangers generally do not exist at all. Plaintiffs can only

---

(1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring); *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 986 (1988); *Burdine*, 450 U.S. at 255.

[23] E.g., *Blalock v. United States Department of the Air Force*, 2000 WL 1598084 at *2 (5th Cir. Oct. 3, 2000); *Graham v. JPMorgan Chase Bank, N.A.*, 2015 WL 4431199 at *5 (S.D.Tex. July 17, 2015); *Wojcik v. Costco Wholesale Corp.*, 2015 WL 1511093 at *6 (N.D.Tex. April 2, 2015); *Monsivais v. Arbitron, Inc.*, 44 F.Supp.3d 702, 715 (S.D.Tex. 2014); *Jones v. FJC Security Services, Inc.*, 40 F.Supp.3d 840, 850 (S.D.Tex. 2014).

[24] *Tapp v. Mead Johnson & Co.*, 2009 WL 435294 at *3 (N.D.Tex. Feb. 20, 2009).

[25] *King v. Grainger, Inc.*, 2012 WL 777319 at *7 (N.D.Miss. Jan. 26, 2012); *Trevino v. United Parcel Service*, 2009 WL 3423039 at *14 (N.D.Tex. Oct. 23, 2009).

establish a prima facie case by comparing themselves to people who usually cannot be found.

"The method suggested in *McDonnell Douglas* for pursuing this inquiry ... was never intended to be rigid, mechanized, or ritualistic." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). But the exactingly detailed Fifth Circuit rule is precisely that. The Fifth Circuit standard in *Lee*, relied on by both courts below, requires an elaborately detailed showing that the employees being compared "held the same job or responsibilities, shared the same supervisor or had their employment status determined by the same person, ... have essentially comparable violation histories" and have engaged in "nearly identical" conduct. 574 F.3d at 260. The decision in *Perez v. Tex. Dep't of Criminal Justice, Inst. Div.*, 395 F.3d 206, 213 (5th Cir. 2004), also relied on by the court of appeals below, holds that it is insufficient that the more favorably treated comparator had committed a violation of "comparable seriousness"; it must be the identical violation. But *McDonnell Douglas* says precisely the opposite. 411 U.S. at 804 ("[e]specially relevant ... would be evidence that white employees involved in acts against [the employer] of comparable seriousness to [the actions of the plaintiff] were nevertheless retained or rehired"). The Fifth Circuit's exceptionally demanding and specific requirement is inconsistent with the holding in *Johnson v. California*, 545 U.S. 162 (2005), that "a prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum

of the proffered facts gives 'rise to an inference of discriminatory purpose.'" 545 U.S. at 169 (quoting *Batson v. Kentucky*, 476 U.S. 79, 94 (1984)).

IV. THE QUESTIONS PRESENTED ARE OF GREAT PRACTICAL IMPORTANCE

The interrelated questions presented in this case are of great practical importance. Courts and litigants in every circuit need guidance from this Court regarding what issue should be addressed, and what evidence is necessary, when a defendant moves for summary judgment in a discrimination case. If the Sixth, Seventh, Eighth and District of Columbia Circuits are right about the applicability of *Aikens* to summary judgment, other circuits are mistakenly dismissing cases which should be permitted to go to trial. As a practical matter, in the Fourth, Fifth and Tenth Circuits, the whole process of evaluating evidence of discrimination has been diverted from the real issue – whether the plaintiff has enough evidence to permit an inference that an employer's reason was a pretext for discrimination – to satisfying a highly detailed prima facie case requirement without regard to the existence of other, possibly highly probative evidence. As the Fifth Circuit made clear, its standard compels the vexing conclusion that a plaintiff cannot establish a prima facie case of discrimination even by showing that a defendant's proffered reasons were a pretext for discrimination. App. 14a n.8.

Even more seriously, the combined effect of the two Fifth Circuit rules in this case is to carve a major exemption into the prohibitions of Title VII and other federal employment laws. In the Fifth Circuit, those laws (and the protections of the Equal Protection Clause) apply with full force only to those uncommon workers with regard to whom there happens to be a similarly situated worker under nearly identical circumstances. Ordinary workers, – who usually are not "similarly situated" to anyone else and whose alleged conduct often is not "nearly identical" to that of someone outside the relevant protected group – cannot establish a prima facie case, and thus will usually be unable to maintain an action for racial or other forms of invidious discrimination. That exclusion is all the worse because an employer can manipulate this rule merely by announcing that it is dismissing or otherwise acting against a worker for some infraction that no one "similarly situated" has committed in "nearly identical" circumstances.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@uw.edu

MARGARET A. HARRIS
BUTLER & HARRIS
1007 Heights Boulevard
Houston, TX 77008
(713) 526-5677

Counsel for Petitioner

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-20292

PETER J. PASKE, JR.,

Plaintiff-Appellant

v.

JOEL FITZGERALD, individually and in his Capacity as Chief of Police of the City of Missouri, Texas; THE CITY OF MISSOURI CITY, TEXAS,

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Texas

---

(Filed May 4, 2015)

Before DAVIS, JONES, and CLEMENT, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

Plaintiff-appellant Peter J. Paske ("Paske") appeals the district court's grant of summary judgment to defendants-appellees Joel Fitzgerald ("Fitzgerald") and the City of Missouri City, Texas (the "City") (collectively, the "Government"). For the reasons explained below, we AFFIRM the judgment of the district court.

FACTS AND PROCEEDINGS

Paske served as a sergeant in the Missouri City Police Department (the "Department"). Paske is white. In 2009 the City hired Fitzgerald to serve as chief of police. Fitzgerald is black. After Fitzgerald's arrival, two captain positions became available. Paske interviewed for the positions, but Fitzgerald chose two other candidates. As relevant here, Fitzgerald hired Geneane Merritt ("Merritt") to fill one of the positions. Merritt is black. Paske and Merritt had various run-ins over the next two years. *See Paske v. Fitzgerald*, No. H-12-2915, 2014 WL 1366552, at *1 (S.D. Tex. Apr. 7, 2014). This growing tension came to a head over events that occurred in July 2011.

On July 11, 2011, Merritt sent an e-mail to Fitzgerald requesting funeral leave so that she could attend her grandmother's funeral in Philadelphia. She told Fitzgerald that "the Funeral [was] going to be on Friday, July 15, 2011," and that she was "hoping to leave to travel on Wednesday, July 13, 2011." The Department approved her request. On July 14, officers observed Merritt's city-issued car being driven around town. The Department dispatched two officers to Merritt's house to investigate. Merritt's mother answered the door. She told the officers that Merritt's daughter had taken Merritt to the airport earlier in the day, and that Merritt "was in Philadelphia for [the] funeral." The officers asked Merritt's mother for the keys to the city-issued car so they could return it to the Department. The officers were waiting at the door while Merritt's mother purported

to search for the keys when Merritt herself appeared. The officers questioned Merritt about her mother's false statements. Merritt responded that "there [were] a lot of kids in the house and she must have got[ten] confused." The next day, July 15, Fitzgerald e-mailed the city manager, informing him that "there [was] some question whether [Merritt] misled us regarding a request for time off." Fitzgerald promised that the issue would be "thoroughly investigated."

The "thorough investigation" promised by Fitzgerald turned out to be nothing more than a generous interpretation of the Department's funeral leave policy. At the time, the policy stated that City officials could "grant a regular, full-time employee paid emergency leave in the event of a death within the employee's immediate family or household," and that "[n]ormally, a one to three day absence should be sufficient depending upon individual circumstances, such as location of the funeral and closeness of the relationship." Fitzgerald testified that, because "it wasn't specified" in the policy "that [Merritt] had to leave town," he determined that she had not violated the policy. Assistant Chief Keith Jemison ("Jemison") admitted that "[t]here was no formal investigation," while Fitzgerald confessed he never investigated whether Merritt had meant to mislead him. It appears from the record that Merritt never traveled to Philadelphia.

Within a few days of the "investigation" into her request for funeral leave, Merritt e-mailed Fitzgerald saying that she wanted to be demoted to lieutenant.

Merritt did not mention the funeral leave issue as a reason for her request. Fitzgerald met with Merritt to discuss her request. He testified that neither of them mentioned the funeral leave issue because "[t]hat didn't factor in." At around the same time, rumors began circulating that Merritt had lied to obtain funeral leave, and that Fitzgerald was allowing her to take a voluntary demotion in lieu of formal discipline.

On July 20, the Department held a COMPSTAT Meeting[1] with all officers, followed by a Supervisor Meeting with only higher ranking officers. At the time, Fitzgerald was considering a proposal to require all officers with the rank of lieutenant or higher to wear white shirts. Paske asked Fitzgerald whether he had reached a decision and quipped that only "firemen, milk[men,] and Klansmen wear white in Texas." Paske averred that Fitzgerald "only smil[ed]" and said he would be make a decision soon. Fitzgerald then opened the floor for questions. It was typical for supervisory officers to "air their complaints or their concerns" during this time, usually about "reports not

[1] COMPSTAT meetings are modeled after a program pioneered by Police Commissioner William Bratton during his first term with the New York City Police Department. In the New York model, precinct commanders are expected to "appear before the department's top echelon to report on crime in their districts and what they are doing about it." James J. Willis, Stephen D. Mastrofski & David Weisburd, *Making Sense of COMPSTAT: A Theory-Based Analysis of Organizational Change in Three Police Departments*, 41 LAW & SOC'Y REV. 147, 147-48 (2007).

being checked" or "operational issues." Paske asked whether "she was getting demoted and was he getting promoted," gesturing to Merritt and the officer rumored to be her replacement as captain.[2] At that point, "Fitzgerald's face turned red[,] and he hesitated for a second," but he confirmed that Merritt was taking a voluntary demotion. A few moments later, Fitzgerald asked Paske "why [he had] not been the proctor for the [COMPSTAT Meeting]" and accused Paske of failing to obey an order issued several months before to lead the COMPSTAT Meetings.[3]

After the Supervisor Meeting, Paske sent Fitzgerald an e-mail apologizing for his "lack of respect at

---

[2] The Department later determined that Paske's reference to his superior officers as "she" and "he" was disrespectful and violated the Department's policies.

[3] In May 2011, Paske volunteered to lead upcoming COMPSTAT Meetings. Paske believed his agreement to lead COMPSTAT Meetings was contingent on his agreement to fill a special operations role, which he later chose not to take on. Captain John Bailey ("Bailey") was the officer generally responsible for leading COMPSTAT Meetings during the relevant time period. He averred that there was some discussion in May 2011 about Paske co-leading the June 2011 COMPSTAT meeting, but that he later heard Paske was going to be out-of-town on the date of the June meeting. Bailey stated that before the July meeting, no one suggested that Paske was supposed to lead the meeting, even when he sent e-mails to Fitzgerald and others making clear that he would lead the meeting as usual. Bailey further averred that the July 2011 meeting "went forward as usual," and that "[n]obody, not Chief Fitzgerald and not anyone else, ever once asked why Sgt. Paske was not at the front of the room running the meeting. Nothing unusual happened in the meeting."

the [COMPSTAT] meeting." A few hours later, Fitzgerald sent an e-mail to the Department's supervisory officers with the suggestive subject line "COMPSTAT meeting outburst." Fitzgerald announced Paske's suspension pending an investigation and commanded those present at the Supervisor Meeting to "ensure you each provide . . . Jemison individual memos specifically regarding . . . Paske's questions, demeanor, and statements, made to me and/or anyone during the COMPSTAT meeting today." He urged the officers to "be as specific as possible."

On July 21, the Department officially charged Paske with disobeying orders and using inappropriate language and suspended him during the investigation. A week later, Fitzgerald called Paske to a meeting (the "Punishment Meeting"). Fitzgerald informed him that he was adopting the investigator's recommendation and imposing an 80-hour suspension without pay. Fitzgerald also went above the investigator's recommendation and demoted Paske to "patrol" with a commensurate decrease in salary. Due to his relocation in the Department's command structure, when Paske returned to work after his suspension, he reported to Merritt.

Almost immediately after Paske's return, Merritt imposed a "Performance Improvement Plan" ("PIP") on him, this time for his allegedly "unacceptable behavior" during the Punishment Meeting. The official notice stated that, during the Punishment Meeting, Paske "became visibly tense, [his] face became red, [he] tightened [his] body and fists, and

began shaking [his] legs." It further charged that he "began to stare off to the left while shaking [his] head."[4] As part of the PIP, the Department ordered Paske to undergo a vocational evaluation, which the parties refer to as an employee assistance program ("EAP").

The EAP sessions were coordinated by a team of vocational experts. Those experts referred their cases to third-party counselors who actually conducted the sessions. A high-ranking officer in the Department called the EAP coordinator and characterized Paske's alleged behavior during the Punishment Meeting as threatening. After Paske told the third-party counselor during his first EAP session that he had lost weight and struggled with his blood pressure, the EAP coordinator reviewing Paske's file recommended to the counselor that Paske be tested for drug use. The counselor resisted ordering a drug test. A short time later, a high-ranking officer in the Department called the EAP coordinator, this time alleging that Paske had lied to the third-party counselor when he said he was taking a week's vacation.[5] After receiving this additional information, the third-party counselor

[4] Officer Paske provided testimony contradicting these allegations. We mention these charges to explain the rationale the Department adopted for imposing the PIP, not because we accept their veracity.

[5] It appears that Paske did not lie about vacation. The vacation time was pre-approved by Paske's immediate supervisors.

relented and agreed to order Paske to undergo drug testing after the second EAP counseling session. The Department arranged for the counselor to give Paske a letter at the end of the session ordering him to report to the Department immediately for testing.

On the morning of the second EAP session, Paske had arranged for his mother-in-law to care for his children. Before Paske left for the session, his mother-in-law was hit by a car and seriously injured. Paske knew he was already in trouble with Fitzgerald, so he decided to leave his infant with a neighborhood acquaintance and his older children unattended at home while he went to the second EAP session. He informed his direct supervisor of his mother-in-law's injury and asked him to inform higher-ups of the family emergency. When the counselor informed Paske about the drug testing requirement, he thought she would conduct the testing. The counselor testified that Paske was willing to undergo testing. When he learned that the Department would coordinate the testing, however, he told the counselor that he feared they would falsify the results to justify his dismissal. After leaving the EAP session, Paske called a high-ranking supervisor and told him about his family emergency. Within a few minutes, Fitzgerald called Paske directly and ordered him to report to the Department within an hour. Paske told Fitzgerald that he "could not" obey the order. Fitzgerald later testified that he "knew when [he] decided not to go to the police department it was the wrong decision." Fitzgerald terminated Paske later that day.

Paske sued the Government, asserting claims for: First Amendment retaliation[6]; Title VII race discrimination; Title VII race retaliation; and related state law claims. The district court granted the Government's motion for summary judgment in part, dismissing all of Paske's federal claims. The district court severed Paske's state law claims and, choosing not to exercise supplemental jurisdiction, remanded them to state court. The district court also granted the Government's motion to exclude certain testimony offered by Paske and Bailey. Paske appeals the district court's evidentiary determination and its dismissal of his federal claims.

STANDARD OF REVIEW

This court reviews a district court's grant of summary judgment de novo. *Avakian v. Citibank, N.A.*, 773 F.3d 647, 650 (5th Cir. 2014). "In reviewing the district court's grant of summary judgment, we must view all the disputed facts and reasonable inferences in a light most favorable to the nonmovant. . . ." *Branton v. City of Dallas*, 272 F.3d 730, 738-39 (5th Cir. 2001). We review a district court's decision to strike summary judgment evidence for an abuse of discretion. *See, e.g.*, *Watts v. Kroger Co.*, 170 F.3d 505, 509 (5th Cir. 1999). "An abuse of discretion occurs only when all reasonable persons would reject

[6] The district court assumed that Paske brought this claim under 42 U.S.C. § 1983.

the view of the district court." *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 638 (5th Cir. 2012).

DISCUSSION

I.

The district court granted the Government's motion to strike evidence in part, excluding portions of Paske and Bailey's testimony. Paske generally contends that his and Bailey's statements are admissible under various rules of evidence. Having considered the various statements and the relevant rules of evidence, we agree with the district court that the statements lacked foundation. *See Paske*, 2014 WL 1366552, at *5-6. It follows that Paske cannot show that all reasonable persons would reject the district court's decision to strike the testimony.

Accordingly, we affirm the district court's decision to strike portions of Paske and Bailey's testimony.

II.

The district court dismissed Paske's First Amendment retaliation claim. It explained that Paske's speech was "confined to his on-duty statements made to superior officers within the department itself regarding the department's inner workings and urging [his] direct and implied complaints and criticisms about Merritt and Chief Fitzgerald." *Id.* at *8. Based on this view of the uncontested evidence, the district

court held that Paske spoke as an employee, not as a citizen. *Id.* We affirm for the same reason.

A.

To establish a prima facie First Amendment retaliation claim, a public employee must show, *inter alia*, that he spoke as a citizen, and not as a public employee. *See Lane v. Franks*, 134 S. Ct. 2369, 2378-80 (2014).[7] In deciding whether a public employee speaks as a citizen or as a public employee, "[t]he critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Lane*, 134 S. Ct. at 2379. When speech-related "[a]ctivities [are] required by one's position or undertaken in the course of performing one's job[ ]," they are within the scope of the employee's duties. *Haverda v. Hays County*, 723 F.3d 586, 598 (5th Cir. 2013). In contrast, if the speech-related activities are "the kind . . . engaged in by citizens who do not work for the

[7] *Lane* did not alter the test established in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). *See Graziosi v. City of Greenville, Miss.*, 775 F.3d 731, 737 n.7 (5th Cir. 2015). The Government submitted a letter brief pursuant to Federal Rule of Appellate Procedure 28(j). It cited *Graziosi* and *Gibson v. Kilpatrick*, 773 F.3d 661 (5th Cir. 2014), and stated that these cases "provide additional authority in support of Appellees' position." We remind counsel that Rule 28(j) briefs "must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally." Fed. R. App. P. 28(j).

government," they are protected. *Garcetti*, 547 U.S. at 423.

B.

Paske was invited to the Supervisor Meeting in his role as a police officer, his attendance was part of his job, and he spoke in response to an invitation from Fitzgerald for job-related questions. Moreover, by participating in internal discussions about the Department's operations, Paske "contribut[ed] to the formation and execution of official policy." *Mills v. City of Evansville, Ind.*, 452 F.3d 646, 647-48 (7th Cir. 2006) (holding that on-duty, in-uniform police officer who spoke to senior managers as they emerged from meeting spoke in her capacity as a public employee), *cited with approval in Williams v. Dall. Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007). We also note that private citizens do not generally have the right to participate in closed-door meetings of ranking police officers. Considering the facts as demonstrated by the record as a whole, the district court did not err when it held that Paske spoke at the Supervisor Meeting as an employee, not a citizen, and that his speech was thus not protected by the First Amendment.

Accordingly, we affirm the judgment of the district court regarding Paske's First Amendment retaliation claim.

III.

The district court dismissed Paske's Title VII race discrimination claim. *See* 42 U.S.C. § 2000e-2(a)(1) (prohibiting race discrimination in employment). The district court held that Paske failed to "present[ ] evidence sufficient to raise a genuine issue of material fact that 'he was treated less favorably because of his [race] than were other similarly situated employees who were not [white], under nearly identical circumstances.'" *Paske*, 2014 WL 1366552, at *11 (second and third alterations in original) (quoting *Lee v. Kan. City S. Ry. Co.*, 574 F.3d 253, 259 (5th Cir. 2009)). We affirm for the same reason.

Because Paske attempted to prove race discrimination through circumstantial evidence, the *McDonnell Douglas* burden-shifting framework governs his claim. *See Burrell v. Dr. Pepper/Seven Up Bottling Grp., Inc.*, 482 F.3d 408, 411-12 (5th Cir. 2007) (discussing modified *McDonnell Douglas* framework used in this circuit). To establish his prima facie case, Paske must show that

> (1) he is a member of a protected class, (2) he was qualified for the position at issue, (3) he was the subject of an adverse employment action, and (4) he was treated less favorably because of his membership in that protected class than were other similarly situated employees who were not members of the protected class, under nearly identical circumstances.

Lee, 574 F.3d at 259. Paske established the first three elements of his prima facie race discrimination claim. To establish the fourth element, Paske was required to show, *inter alia*, that his "conduct that drew the adverse employment decision [was] 'nearly identical' to that of the proffered comparator who allegedly drew dissimilar employment decisions." *Lee*, 574 F.3d at 260 (quoting *Perez v. Tex. Dep't of Criminal Justice, Inst. Div.*, 395 F.3d 206, 213 (5th Cir. 2004)).[8]

Paske offers Merritt and another officer as comparators. Paske makes various allegations concerning Merritt, including: that she lied about the hours she worked for the City in early 2010; that she allowed her daughter's friends, who were known gang members, to stay at her house; that she was bad at her job; and that she lied when she requested funeral

[8] Paske argues that he can establish the fourth element of his prima facie claim by showing that Fitzgerald's stated reasons for firing him were pretextual. That is not the law. First, Paske must establish a prima facie case by pointing to an appropriate comparator. Only then would Fitzgerald and the City have a duty to "offer an alternative non-discriminatory explanation for the adverse employment action." *Id.* at 259. And only after they provided that explanation would the pretext issue become relevant. *Id.* The cases Paske cites to support his misplaced pretext argument make abundantly clear that Paske must prove a prima facie case *as well as* pretext to succeed. *See, e.g.*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000) (explaining that "a plaintiff's prima facie case, *combined with* sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated") (emphasis added).

leave. Paske contends that the other officer: left his service revolver unsecured in his car, from which it was stolen; failed to report the theft; and then carried an unapproved, personal firearm while on duty. Paske was fired for failing to obey a lawful order, for refusing the drug test, for dereliction of duty, and for conduct unbecoming an officer. Even assuming Paske's allegations about Merritt and the other officer are true,[9] their behavior is not even close to being "nearly identical" to Paske's.

Because Paske failed to adduce evidence that a comparator was treated more favorably under nearly identical circumstances, he failed to establish a prima facie case of race discrimination. Accordingly, we affirm the judgment of the district court regarding Paske's race discrimination claim.

IV.

The district court dismissed Paske's Title VII race retaliation claim. *See* 42 U.S.C. § 2000e-3(a) (prohibiting retaliation against those opposing unlawful race discrimination). Paske argues that the Government never moved for summary judgment on his Title VII race retaliation claim, and that the district court granted the motion without giving him a chance

[9] Some of Paske's allegations regarding Merritt have never been addressed by a factfinder and are not well-supported by the record.

to respond. The Government contends that any error was harmless.

"We review for harmless error a district court's improper entry of summary judgment *sua sponte* without notice." *Atkins v. Salazar*, 677 F.3d 667, 678 (5th Cir. 2011). "A district court's grant of summary judgment *sua sponte* is 'considered harmless if the nonmovant has no additional evidence or if all of the nonmovant's additional evidence is reviewed by the appellate court and none of the evidence presents a genuine issue of material fact.'" *Id.* (quoting *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coord. Unit*, 28 F.3d 1388, 1398 (5th Cir. 1994)).

According to Paske's own recollection of the Supervisor Meeting, he asked Fitzgerald simply whether "she was getting demoted and was he getting promoted." Besides Paske's own racially charged reference to "Klansmen" during the Supervisor Meeting, there is no evidence in the record that Paske spoke out about race discrimination. This court "ha[s] consistently held that a vague complaint, without any reference to an unlawful employment practice under Title VII, does not constitute protected activity." *Davis v. Dall. Indep. Sch. Dist.*, 448 F. App'x 485, 493 (5th Cir. 2011) (per curiam) (collecting cases). Just as in *Davis*, "[t]he only racial component of the entire . . . interaction was interjected by [Paske] [him]self," *id.*, when he referred to "Klansmen." Paske "cannot rely upon [his] own use of a racially sensitive word to

demonstrate that [his] accusation had racial overtones." *Id.*[10]

We assume that the district court dismissed Paske's race retaliation claim sua sponte and without notice. Even so, we hold that the district court's dismissal was harmless and affirm the district court's judgment.

CONCLUSION

For the reasons explained, we AFFIRM the judgment of the district court.

[10] Paske argues that Fitzgerald and the City waived their arguments, citing *Martco Ltd. Partnership v. Wellons, Inc.*, 588 F.3d 864 (5th Cir. 2009). *Martco* applies when a summary judgment movant urges the court of appeals to affirm a district court's order for a reason not urged below. *Id.* at 877. *Martco* does not apply when we evaluate whether a district court's sua sponte summary judgment order was harmless. *See Atkins*, 677 F.3d at 678.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PETER J. PASKE, JR., Plaintiff, v. JOEL FITZGERALD, individually and in his capacity as Chief of Police of the City of Missouri City, Texas, and THE CITY OF MISSOURI CITY, TEXAS, Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. H-12-2915

MEMORANDUM AND ORDER

(Filed Apr. 7, 2014)

Pending is Defendants' Motion for Summary Judgment (Document No. 39), Plaintiff's Motion for Partial Summary Judgment (Document No. 40), Plaintiff's Motion to Strike Assertions in and Attachments to Defendants' Motion for Summary Judgment (Document No. 58), and Defendants' Objections to Inadmissible Evidence Filed by Plaintiff in Opposition to Defendants' Motion for Summary Judgment (Document No. 61). After carefully considering the motions, responses, replies, and applicable law, the Court concludes as follows.

I. Background

Plaintiff Peter J. Paske, Jr. ("Plaintiff"), a white man, graduated at the top of his class from a basic peace officer training course in 1995.[1] In 1996, Plaintiff was one of two people hired by the Police Department of Defendant City of Missouri City, Texas (the "City") out of a pool of 80 candidates.[2] Plaintiff was promoted to sergeant and was appointed to run the Criminal Investigations Division ("CID"), where he supervised more than 20 other officers.[3] Plaintiff engaged in extensive training, earning more than 3,500 hours of continuing education as a police officer.[4] Plaintiff was respected and liked by many of his colleagues, who describe him as a good officer and supervisor.[5]

In April 2009, the City appointed Defendant Joel Fitzgerald ("Chief Fitzgerald"), a black man, as its Chief of Police.[6] Chief Fitzgerald had served for almost 18 years in the City of Philadelphia Police Department.[7] Later that year, when two captain's positions became available, Plaintiff was among 26

---

[1] Document No. 52, ex. I ¶ 2.

[2] *Id.*, ex. A at 255:21-24; *id.*, ex. I ¶ 3.

[3] *Id.*, ex. A at 256:4-9; *id.*, ex. B at 70:2-6.

[4] *Id.*, ex. C at 25 of 42.

[5] *See, e.g.*, *id.*, ex. D at 31:12-25; *id.*, ex. E at 34:10-24; *id.*, ex. G at 18:21-25; *id.*, ex. H ¶¶ 3-4.

[6] Document No. 39, ex. G at 148:6-10.

[7] *Id.*, ex. G at 148:13-18.

candidates who applied for the positions.[8] The best applicants were interviewed by an independent panel of police officers from other departments, who provided to Chief Fitzgerald their recommendations in the form of a ranked list.[9] Chief Fitzgerald, who was the ultimate hiring decisionmaker, then interviewed the candidates and created a final ranked promotional list, which was similar to the list he had been given by the panel.[10] Lieutenant Mike Berezin ("Berezin"), an internal candidate who is white, ranked first, and he received the first open captain's position.[11] Plaintiff was ranked fourth, behind Geneane Merritt ("Merritt"), a black candidate, who formerly was a colleague of Chief Fitzgerald in Philadelphia.[12] Merritt received the second captain's position when it opened a few months later.[13] Plaintiff alleges that Chief Fitzgerald did not take his interview with Plaintiff seriously and appeared already to have decided to hire Merritt.[14] Plaintiff testified that he twice asked Chief Fitzgerald to see the test scores, which Chief Fitzgerald refused to permit, and that Plaintiff's

---

[8] *See* Document No. 10 ¶¶ 20-21; Document No. 39 ¶ 3; Document No. 52 at 6.

[9] Document No. 39, ex. H at 53:7-55:9; Document No. 10 ¶ 21.

[10] Document No. 39, ex. H; Document No. 10 ¶ 21.

[11] *See* Document No. 39, ex. H at 55:2-12, 21-23.

[12] *Id.*, ex. H at 55:2-9; Document No. 52, ex. I ¶ 9.

[13] Document No. 39, ex. H at 55:23-24; Document No. 10 ¶ 23.

[14] Document No. 10 ¶ 22; Document No. 52, ex. I ¶ 10.

relationship with Chief Fitzgerald thereafter ceased to be friendly.[15]

Plaintiff alleges that Merritt was unqualified for the captain position, that her lack of qualification was apparent from the background investigation conducted in connection with her hiring, and that she quickly displayed a lack of competence in her new role.[16] Plaintiff further alleges that Merritt engaged in persistent misconduct for which she was not disciplined, including dressing inappropriately, bringing her children to work on a regular basis, and allowing known gang members to stay at her house.[17] Plaintiff refused to sign one of Merritt's time sheets, and told Assistant Chief Worrell that he did not believe Merritt had worked all of the hours she reported.[18] Plaintiff believed Merritt to be incompetent and objected to working under her, and therefore requested and received a transfer out of CID back to patrol.[19]

In July 2011, Merritt took funeral leave for a funeral in Philadelphia, and during her leave two officers found her at her home in Missouri City.[20] Chief Fitzgerald reviewed the funeral leave policy and determined that Merritt had not violated it

---

[15] Document No. 52, ex. I ¶ 14.

[16] Document No. 10 ¶¶ 24, 27; Document No. 52 at 7-9.

[17] Document No. 52 at 9; *id.*, ex. I ¶¶ 12, 18.

[18] Document No. 52, ex. A at 306:20-307:14.

[19] *Id.*, ex. I ¶ 15.

[20] *See id.*, ex. E at 9:15-13:20.

because the policy did not require officers to leave town and attend a funeral in order to take funeral leave.[21] When Plaintiff found out about the incident, he complained to Assistant Chief Keith Jemison ("Jemison"), asserting that Merritt had lied and should be punished, but Jemison told him it was none of his business.[22] Plaintiff was "very upset" with Chief Fitzgerald's apparent "decision to not discipline Merritt for anything she did."[23] Shortly thereafter, Merritt submitted to Chief Fitzgerald a request for her own demotion to lieutenant, which the Chief was happy to receive because she had not performed up to standard.[24]

On July 20, 2011, during a monthly supervisors' meeting conducted by Chief Fitzgerald after an earlier COMPSTAT meeting, Plaintiff voiced an objection to the Chief's desire for high level officers to wear white shirts, commenting that in Texas only firemen, milkmen, and Klansmen wear white.[25] Later in the meeting, Plaintiff, who had heard rumors of Merritt's upcoming demotion, raised his hand and asked Chief Fitzgerald whether Captain Merritt would be demoted, and whether Lieutenant Brandon

---

[21] Document No. 39, ex. H at 92:9-93:7.

[22] Document No. 52, ex. B at 82:18-83:8; *id.*, ex. I ¶ 21.

[23] *Id.*, ex. I ¶ 22.

[24] Document No. 39, ex. H at 101:9-12, 102:13-20.

[25] Document No. 52, ex. I ¶¶ 24-26.

Harris would be promoted.[26] The Chief said he wasn't announcing that information at this time, turned red, and asked Plaintiff if he was not "supposed [to have] run the COMPSTAT meeting today?" Plaintiff said, "No sir." The Chief said, "Yes you were," and ordered Plaintiff to provide a one page memo about why he had not done so, to which Plaintiff replied, "I will give you two pages."[27]

After the meeting, Plaintiff sent to Chief Fitzgerald an email to "apologize for my lack of respect at the compstat meeting today."[28] Later that day, Chief Fitzgerald also sent an email titled "COMPSTAT meeting outburst" to all the other officers who had been present at the meeting, asking them to each provide a memo "regarding Pete Paske's questions, demeanor, and statements" at the meeting.[29] Twelve of the thirteen reports in the record described Plaintiff's conduct as antagonistic, disrespectful, unprofessional, confrontational, defensive, inappropriate, or insubordinate.[30]

Captain Lance Bothell conducted a professional standards investigation into charges against Plaintiff for disobeying a lawful order, discourteous or insulting

---

[26] Document No. 39, ex. A ¶¶ 8-9; Document No. 52, ex. I ¶ 27.

[27] Document No. 52, ex. I ¶ 27.

[28] Document No. 39, ex. Q.

[29] Document No. 52-5 at 15 of 21.

[30] *See* Document No. 39, ex. R.

language, and unbecoming conduct, and the investigation was reviewed by Jemison and Chief Fitzgerald.[31] Plaintiff was suspended with pay during the investigation.[32] On July 27, 2011, Chief Fitzgerald and his command staff met with Plaintiff and informed him that he was being demoted to officer with a loss of pay.[33] Plaintiff was visibly upset during the meeting.[34]

On August 2, Chief Fitzgerald and his command staff again met with Plaintiff and put him on a Performance Improvement Plan.[35] The Performance Improvement Plan required Plaintiff successfully to complete a fitness for duty evaluation with the Employee Assistance Program ("EAP"), and, *inter alia*, to "follow all lawful orders" and "not display pompous, argumentative, or disrespectful behavior to any citizen, fellow officer, or supervisor."[36] The Plan, which Plaintiff signed, further cautioned Plaintiff that "[f]ailure to adhere to all City of Missouri City or Missouri City Police Department policies and

---

[31] *See* Document No. 52-5 at 16 of 21 to 19 of 21.

[32] *Id.*; Document No. 52, ex. I ¶ 29.

[33] Document No. 39, ex. Z at 158:16-159:7, 168:2-19; Document No. 52, ex I ¶ 30.

[34] *See* Document No. 39, ex. Z at 159:9-10 ("He looked like he was seething and about to boil over."); Document No. 52, ex. I ¶ 30 ("I could feel my face turn red.").

[35] Document No. 39, ex. N; Document No. 52, ex. I ¶ 32.

[36] Document No. 39, ex. N.

procedures will result in dismissal, by order of the Chief of Police."[37]

On August 4, Paske attended his first EAP appointment in the Texas Medical Center, where he was told he would have to return two more times.[38] After the meeting, EAP representative Delphi Medina wanted to rule out the possibility of drug use, and contacted Berezin, now Assistant Chief, to suggest that Plaintiff be drug tested.[39] Berezin immediately reported the conversation to Chief Fitzgerald.[40]

Plaintiff's next EAP appointment was scheduled for the morning of August 17, and Plaintiff had arranged for his mother-in-law to watch his three children and three of their cousins until Plaintiff returned from the appointment.[41] That morning, Plaintiff's mother-in-law was hit by a car and taken to the hospital.[42] Paske arranged for temporary care of the children and attended his EAP appointment.[43] During the session, the EAP provider advised Plaintiff that he would need to submit to a drug test that day and

---

[37] *Id.*

[38] Document No. 52, ex. I ¶ 34.

[39] Document No. 39, ex. X at 30:21-25; *id.*, ex. Z at 174:16-25, 178:11-13.

[40] *Id.*, ex. Z at 183:7-10.

[41] *Id.*, ex. E at 20:3-22:19; Document No. 52, ex. I ¶ 35.

[42] Document No. 52, ex. I ¶ 35.

[43] *Id.*; Document No. 39, ex. E at 23:8-23, 25:3-12; *id.*, ex. W.

gave him written instructions to call Assistant Chief Jemison and report to the police department.[44]

Plaintiff called Jemison and explained that because of the situation with his mother-in-law, he could not report to the police station.[45] A few minutes later, after Jemison reported the call to Chief Fitzgerald, Chief Fitzgerald called Plaintiff and ordered him to come into the police station within one hour.[46] Plaintiff insisted that he could not come in and Chief Fitzgerald hung up.[47] Plaintiff admits that Chief Fitzgerald's order to report to the police station was a lawful direct order and that he did not comply with it.[48] That evening, Chief Fitzgerald sent to Plaintiff an email discharging Plaintiff from the police department for violating departmental regulations, specifically disobeying a lawful order, refusing a drug examination, dereliction of duty, and unbecoming conduct.[49]

Plaintiff retained counsel and appealed his demotion and termination to City Manager Allen

---

[44] Document No. 39, ex. E at 25:21-24, 26:4-9.

[45] *Id.*, ex. E at 26:8-20.

[46] *Id.*, ex. E at 27:4-21.

[47] *Id.*, ex. E at 27:12-21.

[48] *Id.*, ex. A ¶¶ 27-30; *id.*, ex. D at 382:12-16 ("Q. This is the way it sounds to me. Tell me if I'm correct. You got an order. You thought the order was unreasonable. So you chose not to comply with it. A. Correct."); *id.*, ex. G at 51:12-18.

[49] Document No. 39, ex. M; Document No. 52, ex. I, ¶ 37.

Mueller ("Mueller").[50] Mueller reviewed the available evidence and wrote a nine-page report to Plaintiff, concluding:

> I do not believe Chief Fitzgerald erred in recommending you be demoted in rank or in recommending your discharge from the City's police department, and I certainly find no reason to believe Chief Fitzgerald's decisions or recommendations were motivated by anything other than appropriate supervisory considerations. Likewise, I do not believe that restoring you to service in the City's police department, at any rank, would benefit the City's interests.[51]

As required by Texas law, Chief Fitzgerald submitted an F-5 Report regarding Plaintiff's termination to the Texas Commission on Law Enforcement Standards and Education ("TCLEOSE").[52] The report indicated that Plaintiff had been discharged for "insubordination or untruthfulness," which qualified as "dishonorably discharged."[53] In a two-day evidentiary hearing before a Texas Administrative Law Judge, Plaintiff challenged the report, contending that he should have received an honorable discharge.[54] On

---

[50] Document No. 39, ex. E at 47:21-24; *id.*, ex. aa at 1 of 25 to 11 of 25.

[51] Document No. 39, ex. I at 8-9.

[52] *See id.*, ex. B at 2.

[53] *Id.*, ex. B at 2-3; Document No. 10 ¶ 75.

[54] Document No. 39, ex. B at 1.

February 6, 2013, the Administrative Law Judge issued a Decision and Order, finding that "the preponderance of the evidence establishes that [Plaintiff] was terminated for insubordination," and that the report properly-indicated that he was dishonorably discharged.[55]

Meanwhile, on September 13, 2012, Plaintiff filed this lawsuit, which Defendants removed to this Court.[56] Plaintiff's First Amended Complaint alleges causes of action for First Amendment violations and race discrimination and retaliation, and seeks a declaratory judgment that Defendants violated their statutory obligations under Texas Government Code § 164.022.[57]

II. Evidentiary Objections

A. Plaintiff's Objections

Plaintiff objects generally to the voluminous record attached to Defendants' Motion for Summary Judgment, arguing in a series of objections that the Court should strike Defendants' Exhibits J, L, P, T, U, V, W, Y, bb, cc, dd, ff, hh, jj, kk, ll, mm, nn, oo, pp, qq, rr, ss, and tt, which Plaintiff claims Defendants never cite in their Motion, along with all uncited portions of Defendants' Exhibits D, E, F, G, X, Z, ee, and gg, each

---

[55] *Id.* at 12.

[56] Document No. 1.

[57] Document No. 10 ¶¶ 76-78.

of which is a lengthy transcript only minimally cited by Defendants.[58]

In reviewing a motion for summary judgment, "[t]he court need consider only the cited materials, but it may consider other materials in the record." FED. R. CIV. P. 56(c)(3). Indeed, it is not good practice and unduly burdens the record for Defendants to include vast numbers of documents and pages of transcripts that Defendants do not rely on or expect the Court to read, but the surplusage does not prejudice Plaintiff nor impede Plaintiff from pointing to evidence that may raise material fact issues, and Plaintiff's objections are therefore OVERRULED.[59]

Separately, Plaintiff states an objection entitled, "The Unsupported Contention About Child Care for His Children," in which Plaintiff does not identify any particular evidence to which he objects or moves to strike.[60] To the extent an evidentiary objection is intended – as distinguished from argument – the

---

[58] Document No. 58. Defendants filed more than 1,400 pages of documents – of which 750 are transcripts of depositions initiated by Plaintiff – in support of their Motion for Summary Judgment. *See* Document No. 39, exs. A-vv. Plaintiff filed almost 500 pages of documents in response. *See* Document No. 52, exs. A-X.

[59] It is well established that "[*t*]*he party opposing summary judgment* is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim." *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998) (emphasis added).

[60] *See* Document No. 58 at 2.

objection is OVERRULED. Plaintiff's remaining objections are for the most part argumentative – as to the proper interpretation to be given to the evidence, or that there is no proper purpose for including the materials. Plaintiffs' remaining objections are all OVERRULED.

B. Defendants' Objections

Defendants object to part or all of several exhibits attached to Plaintiff's Response to Defendants' Motion for Summary Judgment, primarily arguing that they lack foundation.[61] *See* FED. R. EVID. 602. Defendants' specific objection to the following portion of the deposition testimony of Captain Lance Bothell, found in Plaintiff's Exhibit F, is SUSTAINED to the extent it is offered for anything more than Captain Bothell's personal impression, and otherwise OVERRULED:

> Q: Did Sergeant Paske's behavior in that supervisors' meeting of July 2011 in any way affect the operations of the department?
>
> * * *
>
> A: No. I don't believe so.
>
> Q (By Ms. Harris): Did it in any way cause any kind of adverse influence on the workplace?

[61] Document No. 61.

* * *

A: No.[62]

Defendants' specific objection to Plaintiff's Exhibit H, the Declaration of David Avera, because Avera's identity was not disclosed until three days before the discovery cut-off date is OVERRULED because Defendants have not established when Plaintiff learned of Avera having discoverable information so as to require his disclosure or that Avera's identity was a surprise to Defendants given that Avera is an employee of the City.[63]

Defendants object to more than 50 separate statements in Avera's declaration to which they generally object on the basis of "FED. R. CIV. P. 56(c)(4) and FED. R. EVID. 402; 602; 611(a) (speculative); and 701; 801(c); 802; [and] 805."[64] Evidentiary objections must be specific. *United States v. Avants*, 367 F.3d 433, 445 (5th Cir. 2004); FED. R. EVID. 103(a)(1). Because Defendants do not specify which of their objections apply to which of the numerous statements they identify, their objections are OVERRULED. The Court will not, however, consider any plainly inadmissible evidence. *See Tucker v. SAS Inst., Inc.*, 462 F. Supp. 2d 715, 722 (N.D. Tex. 2006) ("Because the plaintiff's objections in her motion to strike do not meet the specificity requirement of Rule

---

[62] Document No. 52, ex. F at 95:7-15.

[63] *See* Document No 61 at 2.

[64] *Id.* at 2-7.

103(a)(1), the motion is denied. Even so, the court will not consider any of the defendant's evidence that is plainly inadmissible.").

Defendants object to various portions of Plaintiff's Exhibit I, Plaintiff's Declaration. Defendants' specific objections are SUSTAINED as to the following statements in Plaintiff's Declaration, as lacking foundation: "Merritt was not punished for her blatant lie, which has always been a termination offense at the police department."; "This was soon after Merritt had lied about her funeral leave, and I knew the administration was not going to do anything to punish her."; and "Everyone wanted to keep quiet, keep your head down, and not make waves. The code of silence became, and still is, a way of life during Fitzgerald's term as Chief. So no one said or did anything about his misconduct or his discriminatory hiring practices." Defendants' objections to the following statements are SUSTAINED only as to the italicized portions: "I was very upset with Chief's decision not to discipline Merritt for anything she did, *especially when she lied so blatantly about the funeral leave*."; and "I was still in shock that they were placing these unwarranted demands on me, *only to make my life miserable*."

Defendants' specific objections to Plaintiff's Exhibit J, the Declaration of John Bailey, are SUSTAINED as to the following statements, as lacking foundation: "The department became much more a workplace of fear for many."; "several people were hesitant to bring up serious issues with the Chief and

rarely voiced any objections to, or even questioned, his decisions. Many knew it was useless to do so."; "But still, the members of the department were afraid to complain about her misconduct."; "it had to have been known to the Chief and his immediate staff and, the thinking went, if he wasn't going to do anything about it, it would only make matters worse for whoever even asked him why this behavior was allowed."; "[Merritt] got away with lying about going to a funeral of her grandmother in Philadelphia."; and "He did not develop a fear of the Chief as most people did, or if he did he hid that feeling." Defendants' specific Rule 602 objections are SUSTAINED as to the following statements in Bailey's Declaration: "I heard that she was not even at work when she was supposed to be."; and "I heard that Capt. Merritt sent an email saying that her grandmother had died and that she was going to attend the funeral. Apparently she was approved for funeral leave to go to Philadelphia. But, two officers were sent to her house and discovered that she had not left town after all." Defendants' remaining objections to Bailey's Declaration are all OVERRULED.

Defendants' objection to Plaintiff's Exhibit T, the "Expert Report of Melvin L. Tucker," is OVERRULED because Plaintiff has subsequently submitted the proper verification. *See Straus v. DVC Worldwide, Inc.*, 484 F. Supp. 2d 620, 633-34 (S.D. Tex. 2007) (Rosenthal, J.) (expert report properly authenticated by a sworn declaration filed while summary judgment motion was pending).

Those portions of the evidence to which objections are sustained are STRICKEN, and all remaining objections are OVERRULED.

III. Motions for Summary Judgment

A. Legal Standard

Rule 56(a) provides that "[t]he court shall grant summary judgment 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). Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials in a pleading, and unsubstantiated assertions that a fact issue exists will not suffice. *Id.* "[T]he nonmoving party must set forth specific facts showing the existence of a 'genuine' issue concerning every essential component of its case." *Id.* "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record . . . or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." FED. R. CIV. P. 56(c)(1). "The court need consider only

the cited materials, but it may consider other materials in the record." *Id.* 56(c) (3).

In considering a motion for summary judgment, the district court must view the evidence "through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2513 (1986). All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986). "If the record, viewed in this light, could not lead a rational trier of fact to find" for the nonmovant, then summary judgment is proper. *Kelley v. Price-Macemon, Inc.*, 992 F.2d 1408, 1413 (5th Cir. 1993). On the other hand, if "the factfinder could reasonably find in [the nonmovant's] favor, then summary judgment is improper." *Id.* Even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that "the better course would be to proceed to a full trial." *Anderson*, 106 S. Ct. at 2513.

B. Analysis

1. First Amendment Retaliation

Plaintiff alleges that "Paske had a right to speak out against misconduct being committed by the higher-ups at the Missouri City Police Department without suffering retaliation, including the loss of a job. The right is a well-recognized constitutional right and both Fitzgerald and Missouri City are properly

charged with this knowledge."[65] The Court infers that Plaintiff brings his First Amendment Retaliation claim pursuant to 42 U.S.C. § 1983.[66]

To establish a § 1983 claim for retaliation against protected speech, Plaintiff must show: (1) he suffered an adverse employment action; (2) he spoke as a citizen on a matter of public concern; (3) Plaintiff's interest in the speech outweighs the government's interest in efficiency; and (4) the speech precipitated the adverse employment action. *Nixon v. City of Houston*, 511 F.3d 494, 497 (5th Cir. 2007). Once a plaintiff has shown that his protected speech "was a substantial or motivating factor in the defendant's adverse employment decision, a defendant may still avoid liability by showing, by a preponderance of the evidence, that it would have taken the same adverse employment action even in the absence of the protected speech." *Haverda v. Hays Cnty.*, 723 F.3d 586, 591-92 (5th Cir. 2013) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 97 S. Ct. 568, 576 (1977).

---

[65] Document No. 10 ¶ 76.

[66] *See id.* ¶ 84 (seeking declaratory judgment that Defendants violated, *inter alia*, 42 U.S.C. § 1983). The Civil Rights Act of 1866 creates a private right of action for redressing the violation of federal law by those acting under color of state law. 42 U.S.C. § 1983; *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 104 S. Ct. 892, 896 (1984). Section 1983 is not itself a source of substantive rights but merely provides a method for vindicating federal rights conferred elsewhere. *Albright v. Oliver*, 114 S. Ct. 807, 811 (1994).

It is undisputed that Plaintiff suffered adverse employment actions when he was demoted and then terminated. Plaintiff alleges that his demotion and termination were in retaliation for his complaints against Captain Merritt and his criticism of Chief Fitzgerald for failing to respond appropriately to Merritt's misconduct.[67] Plaintiff cites to his own testimony that in conversations with his superiors he spoke out against Merritt's alleged timesheet falsification, dishonesty relating to a funeral leave when her grandmother died, absenteeism, incompetence, and ineptitude at public speaking.[68]

"[B]efore asking whether the subject-matter of particular speech is a topic of public concern, the court must decide whether the plaintiff was speaking 'as a citizen' or as part of her public job." *Davis v. McKinney*, 518 F.3d 304, 312 (5th Cir. 2008) (quoting *Mills v. City of Evansville*, 452 F.3d 646, 647 (7th Cir. 2006)); *see also Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006) ("[W]hen 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."). The focus of this inquiry is not on the content of the speech, but on "the role the speaker occupied when he

---

[67] Document No. 10 ¶ 58 (Chief Fitzgerald "was punishing [Plaintiff] for refusing to keep his mouth shut about Merritt's misconduct and Fitzgerald's failure to take action on it.").

[68] Document No. 52, ex. B at 80:8-24.

said it." *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 692 (5th Cir. 2007). "Even if the speech is of great social importance, it is not protected by the First Amendment so long as it was made pursuant to the worker's official duties." *Id.* (citing *Garcetti*, 126 S. Ct. at 1960). The inquiry into the protected status of speech is one of law, not fact. *Connick v. Myers*, 103 S. Ct. 1684, 1690 n.7 (1983).

A public employee's speech pursuant to his official duties is not limited to speech that is required by his job; "[a]ctivities undertaken in the course of performing one's job are activities pursuant to official duties" and are therefore unprotected by the First Amendment. *Williams*, 480 F.3d at 693 (memorandum from high school coach to office manager and principal complaining about funding problems not protected speech); *see also Nixon*, 511 F.3d at 498-99 (unauthorized press statements by police officer in uniform not protected speech) ("The fact that Nixon's statement was unauthorized by HPD and that speaking to the press was not part of his regular job duties is not dispositive-Nixon's statement was made while he was performing his job, and the fact that Nixon performed his job incorrectly, in an unauthorized manner, or in contravention of the wishes of his superiors does not convert his statement at the accident scene into protected citizen speech.").

The complaints and criticisms for which Plaintiff contends Chief Fitzgerald retaliated against him in violation of his First Amendment rights were made to Plaintiff's superiors and other police officers. Plaintiff

aimed his criticisms at Merritt, the officer who received the captaincy to which Plaintiff had aspired and under whose command he chafed to the point of requesting a reassignment to patrol officer, and at Chief Fitzgerald, who selected Merritt rather than Plaintiff for the captaincy and who Plaintiff believed improperly tolerated Merritt's ineffectiveness and failed to discipline her for various misconduct he believed she had committed. Thus, Plaintiff variously asked the Chief on two occasions to disclose the test scores of the applicants for the captaincy that Plaintiff had not received, complained to Assistant Chief Worrell and to Assistant Chief Jemison about Merritt's failures and misconduct, expressed his disagreement with the Chief's white shirts policy preference in a meeting of supervisors, and in that same setting confronted the Chief by asking if Captain Merritt would be demoted and Lieutenant Harris would be promoted. This was the same meeting in which the Chief ordered Plaintiff to write a one-page memo explaining why Plaintiff had not run the COMPSTAT meeting, to which Plaintiff disrespectfully retorted, "I will give you two pages." The universe of Plaintiff's "speech" was confined to his on-duty statements made to superior officers within the department itself regarding the department's inner workings and urging Plaintiff's direct and implied complaints and criticisms about Merritt and Chief Fitzgerald. Plaintiff himself made no pretense that he was speaking in the role of a citizen upon matters of public concern but rather claimed as an officer that it

was his "business" to raise critical questions up the chain of command about Merritt and the Chief.[69]

---

[69] On Merritt's funeral-leave conduct and the Chief's response, for example, Plaintiff testified as follows:

> Q. (By Mr. Giles) All right. So anyway so you learned that Lieutenant Merritt potentially violated the funeral-leave policy, but you learned of it after she – after the Police Department sent officers to her house to investigate that; is that correct?
>
> A. Yes.
>
> Q. So you didn't report the incident which caused someone to investigate it, did you?
>
> A. I did not call it in.
>
> Q. Okay. Now, when you learned of the event after it occurred, you spoke to Chief Jemison about it; is that correct?
>
> A. I spoke to – yes.
>
> Q. Okay. And what did you say to Chief Jemison?
>
> A. I said, you know, it's a violation, she lied and, you know, what's going to be done in regards to her lying about where she was at that evening and –
>
> * * *
>
> Q. And what did Chief Jemison say to you when you approached him regarding that issue?
>
> A. "Leave it alone; it's none of your business."
>
> Q. And, in fact, it was none of your business, was it?
>
> A. *I'm a Sergeant at the police department. It's partially – she – it's part of my business*.
>
> * * *
>
> Q. And so how was it your business as Captain Merritt's subordinate regarding how the command staff supervised Captain Merritt?

(Continued on following page)

The Supreme Court held in *Connick v. Myers*, 103 S. Ct. 1684, 1690 (1983), that

> when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

To assume that Plaintiff's various complaints about Merritt and Chief Fitzgerald were matters of public concern, just as in *Connick*,

> would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

A. *Well, just my – the division I worked for and the people I worked for that I supervised, it made it my business to – I felt that personally it was my business*.

Document No. 52, Ex. B at 82:9-84:2 (emphasis added).

Id. at 1691. Viewing the summary judgment record as a whole in a light most favorable to Plaintiff, the content, form, and context of Plaintiff's various statements of complaint did not constitute speech as a citizen on matters of public concern protected by the First Amendment. To the extent that any particular complaint made by Plaintiff is arguably protected, Plaintiff has nothing more than a "limited First Amendment interest [that] does not require that [Chief Fitzgerald] tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 1694. Defendants' demotion of Plaintiff, and later his discharge, did not offend the First Amendment.[70]

---

[70] Plaintiff also pled Title VII retaliation in his Complaint, but has not urged it in responding to Defendants' Motion for Summary Judgment, except possibly for one sentence that may obliquely refer to it: "Paske decided it was time for someone to protest Fitzgerald's failure to do his job and apply the rules equally, without regard to race." Document No. 52 at 10. The testimony Plaintiff relies upon for this assertion pertains only to Plaintiff's complaints about Merritt's behavior, with no mention of race or of Chief Fitzgerald. Plaintiff has not pointed to any evidence that during his employment as a police officer he ever spoke out or complained about racism or participated in any other activity protected by Title VII. The City is therefore entitled to summary judgment on Plaintiff's Title VII retaliation claim. The Fifth Circuit "ha[s] consistently held that a vague complaint, without any reference to an unlawful employment practice under Title VII, does not constitute protected activity." *Davis v. Dallas Indep. Sch. Dist.*, 448 F. App'x 485, 493 (5th Cir. 2011) (collecting cases); *see also Tratree v. BP N. Am. Pipelines, Inc.*, 277 F. App'x 390, 395 (5th Cir. 2008) ("Complaining about

(Continued on following page)

2. Race Discrimination

Plaintiff alleges that the City's conduct "also violates state and federal laws that prohibit discrimination against individuals because of their race and prohibits retaliation for speaking out against racism," and that he fulfilled all legal prerequisites to filing this lawsuit, by having "timely filed a Charge of Discrimination with the Equal Employment Opportunity Commission and the Texas Workforce Commission."[71] Plaintiff's claims under the Texas Commission on Human Rights Act and counterpart federal Title VII claims will be considered together under a Title VII analysis.

Title VII proscribes an employer from refusing to hire, discharging, or otherwise discriminating against any individual "with respect to his compensation, terms, conditions, or privileges of employment" because of that individual's race. 42 U.S.C. § 2000e-2(a)(1). The Title VII inquiry is "whether the defendant intentionally discriminated against the plaintiff." *Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 651 (5th Cir. 2004). Intentional discrimination can be established through either direct or circumstantial evidence. *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 219 (5th Cir. 2001). Because Plaintiff presents no

---

unfair treatment without specifying why the treatment is unfair . . . is not a protected activity.") (citing *Harris-Childs v. Medco Health Solutions*, 169 F. App'x 913 (5th Cir. 2006)).

[71] Document No. 10 ¶ 77.

direct evidence of discrimination,[72] his claim must be analyzed using the framework set forth in *McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817 (1973). *Wallace*, 271 F.3d at 219. Under this framework, a plaintiff must first establish a *prima facie* case of discrimination. *Id.*

Once the plaintiff establishes a *prima facie* case, the burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions. *Id.* If the employer sustains its burden, the *prima facie* case is dissolved, and the burden shifts back to the plaintiff to establish either: (1) that the employer's proffered reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) the employer's reason, while true, is not the only reason for its conduct, and another "motivating factor" is the plaintiff's protected characteristic (mixed-motive alternative). *Id.*; *Burrell v. Dr. Pepper/Seven Up Bottling Grp., Inc.*, 482 F.3d 408, 411-12 (5th Cir. 2007). Where, as here, the Plaintiff alleges pretext, he "must put forward evidence rebutting each of the nondiscriminatory reasons the employer articulates." *Wallace*, 271 F.3d at 220.

"To establish a *prima facie* case of racial discrimination in employment, an employee must demonstrate

---

[72] *See* Document No. 39, ex. E at 91:24-92:2, 92:7-17 (Plaintiff is unaware of any information showing that Chief Fitzgerald disciplined him because of his race or has made any statements indicating racial bias).

that (1) he is a member of a protected class, (2) he was qualified for the position at issue, (3) he was the subject of an adverse employment action, and (4) he was treated less favorably because of his membership in that protected class than were other similarly situated employees who were not members of the protected class, under nearly identical circumstances." *Lee v. Kansas City S. Ry. Co.*, 574 F.3d 253, 259 (5th Cir. 2009).

Defendants do not dispute that Plaintiff can establish the first three prongs of the *prima facie* case.[73] Plaintiff is a member of a protected class because he is white, nobody challenges that he was qualified for his job, and he was indisputably the subject of adverse employment actions when he was demoted and then fired. Defendants argue, however, that "Paske has not, and cannot, show he was treated less favorably than other similarly situated police officers who were not white."[74]

The "nearly identical" standard required to show that a comparator employee is similarly situated is stringent, and excludes employees with "different responsibilities, different supervisors, different capabilities, different work rule violations or different disciplinary records." *Beltran v. Univ. of Tex. Health Sci. Ctr. at Houston*, 837 F. Supp. 2d 635, 642 (S.D. Tex. 2011) (Miller, J.) (citing *Lee*, 574 F.3d at 259-60).

---

[73] *See* Document No. 39 at 10-11.

[74] Document No. 39 at 10.

Although *Lee* emphasized that "nearly identical" does not mean "identical," it requires a great deal of similarity:

> The employment actions being compared will be deemed to have been taken under nearly identical circumstances when the employees being compared held the same job or responsibilities, shared the same supervisor or had their employment status determined by the same person, and have essentially comparable violation histories. And, critically, the plaintiff's conduct that drew the adverse employment decision must have been 'nearly identical' to that of the proffered comparator who allegedly drew dissimilar employment decisions.

Lee, 574 F.3d at 260 (citations omitted).

Plaintiff argues that Merritt was a similarly situated black officer who committed the same violations and was not punished.[75] Even assuming, *arguendo*, that Merritt's rank as a captain and later a lieutenant did not preclude a finding that she was similarly situated to Plaintiff, neither her conduct nor her violation history was nearly identical to Plaintiff's. *See Okoye v. Univ. of Texas Houston Health Sci. Ctr.*, 245 F.3d 507 (5th Cir. 2001) (plaintiff could not compare herself to three co-workers who were not fired despite committing violations because, unlike plaintiff, the co-workers were not accused of assault);

[75] Document No. 52 at 16.

cf. Lee, 574 F.3d at 262 (employees were similarly situated when they held identical positions and compiled a similar number of moving violations, including an identical infraction for which one was fired and the other granted leniency).

Plaintiff was demoted from sergeant to officer after his confrontational and disrespectful conduct directed at the Chief of Police in a supervisors' meeting, which even Plaintiff characterized as a "lack of respect" for the Chief.[76] Plaintiff has not pointed to any evidence that Merritt or any other officer was disrespectful to a superior officer, or to the Chief himself, and concomitantly he has not shown that any other officer did so under nearly identical circumstances and was not disciplined.

Plaintiff was terminated after he disobeyed a direct lawful order given by the Chief of Police to report to the police station for drug testing. Plaintiff has not produced, and admits he cannot produce, any evidence that any other officer ever chose not to comply with an order from a supervising officer that he considered unreasonable and escaped discipline, or that Merritt ever told the Chief of Police that she would not comply with a direct order that the Chief gave to her.[77] Furthermore, it was only two weeks

---

[76] Document No. 39, ex. Q.

[77] *Id.*, ex. D at 367:25-368:5 ("Q. Are you familiar with any officer who had a single order from a supervising officer, where the officer chose not to comply with it because he thought it was unreasonable and the officer was not disciplined. A. No, sir."); (Continued on following page)

before Plaintiff disobeyed Chief Fitzgerald's direct order to report to the police station, that Plaintiff had signed a Performance Improvement Plan which expressly required him to "follow all lawful orders" and "not display pompous, argumentative, or disrespectful behavior to any citizen, fellow officer, or supervisor," and which informed Plaintiff that he would be terminated if he failed to comply with department policy.[78] Plaintiff has presented no evidence that any other police officer serving under such a direct performance improvement mandate violated its material terms and was not terminated.

Plaintiff has not presented evidence sufficient to raise a genuine issue of material fact that "he was treated less favorably because of his [race] than were other similarly situated employees who were not [white], under nearly identical circumstances." *Lee*, 574 F.3d at 259. Because Plaintiff has presented no evidence sufficient to establish a *prima facie* case of race discrimination under Title VII, Defendants are entitled to summary judgment.

---

id., ex. E at 61:4-9 ("Q. My question is very specific, and I'm asking you do you have any information that Lieutenant Merritt ever told Chief Fitzgerald that she would not comply with a direct order he gave her. A. Not that she specifically told him she was not going to comply with a direct order he gave her.").

[78] *Id.*, ex. N.

3. Texas Government Code Chapter 614, Subchapter B

Plaintiff and Defendants each move for summary judgement on whether Defendants violated Sections 614.022 and 614.023 of the Texas Government Code when Chief Fitzgerald fired Plaintiff.[79] These sections provide procedural protections for Texas law enforcement officers against whom complaints are lodged. Essentially, the complaint must be in writing, signed by the complainant, and given to the officer, and the officer may not be terminated on the subject matter of the complaint without an investigation that yields evidence to prove the allegation of misconduct. *See* TEX. GOV'T CODE §§ 614.021-614.023. Plaintiff seeks a declaratory judgment that Defendants violated their statutory obligations under Section 614.022 by failing to provide to Plaintiff a written complaint before terminating him.[80] Defendants respond that Sections 614.022 and 614.023 do not apply to a situation like this where the decisionmaker, the Chief of Police himself, was the commanding officer whose direct order was disobeyed and where he therefore had full first-hand knowledge of the misconduct for which he terminated Plaintiff's employment.[81] Defendants further argue that Plaintiff later was given an adequate written complaint, that any violation of Section 614.022 and 614.023 was therefore remedied, and

[79] Document No. 39 at 33-35; Document No. 40.

[80] Document No. 10 ¶¶ 78, 80-82.

[81] Document No. 48 at 6-7.

that regardless reinstatement is not an appropriate remedy.

The Texas courts appear not to have definitively resolved important questions on whether these procedural safeguards apply to *all* complaints, regardless of the source from which they emanate; whether a signed complaint is required in *all* circumstances where disciplinary action is taken against an officer; and what – if anything – is the remedy if these statutory requirements are violated. *See, e.g.*, *Treadway v. Holder*, 309 S.W.3d 780, 784 (Tex. App. – Austin 2010) (holding 2-1 that a written complaint must be filed even by supervisors within the department complaining up the chain of command, with the dissenting justice foreseeing the issue that has arisen in this case and observing that "under the majority's construction, the agency head's own allegations could not even be 'considered' until he first wrote them down and signed the document."); *City of Houston v. Wilburn*, 01-12-00913-CV-2013, 2013 WL 3354182, at *4 (Tex. App. – Houston [1st Dist.] July 2, 2013) (avoiding the 'question of whether Chapter 614 requires a signed complaint in all circumstances resulting in disciplinary action against employees under its purview"); *City of Athens v. MacAvoy*, 353 S.W.3d 905, 909 (Tex. App. – Tyler 2011) ("Section 614.023 contains no specific consequence for noncompliance."); *but see Guthery v. Taylor*, 112 S.W.3d 715 (Tex. App. – Houston [14th Dist.] 2003) (ordering defendants to withdraw disciplinary action and restore back pay and benefits).

The procedural safeguards provided by these sections of Chapter 614 have broad application to many law enforcement officers of the State of Texas, firefighters, peace officers appointed or employed by political subdivisions of the State, detention officers, county jailers, and others, as well as to the departments that are their employers, and the legislation entails important public policy. Capable counsel on both sides of this case make strong opposing arguments as to how Sections 614.021 and 614.022 should correctly apply to the facts of this case. In the absence of controlling state authority on how the statute applies in a case with facts like these, and finding that this claim raises novel and complex issues of state law that both Plaintiff and Defendants argue should be adjudged in their favor on summary judgment as a matter of law, and given that all federal claims over which the Court has original jurisdiction are dismissed with prejudice in this Memorandum and Order, the Court concludes that the important interests of federalism and comity will be well served by remanding this purely state law claim for determination by the courts of Texas. Accordingly, the Court declines to exercise supplemental jurisdiction over this sole remaining state law claim. *See* 28 U.S.C. § 1367(c) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . if – (1) the claim raises a novel or complex issue of State law, [or] (3) the district court has dismissed all claims over which it has original jurisdiction"); *Enochs v. Lampasas Cnty.*, 641 F.3d 155, 161 (5th Cir. 2011) ("Our general rule is to dismiss state claims when the

federal claims to which they are pendent are dismissed.").

IV. Order

For the foregoing reasons, it is

ORDERED that Defendants' Motion for Summary Judgment (Document No. 39) is GRANTED in part, and Plaintiff Peter J. Paske's federal and state claims for race discrimination and retaliation and retaliation in violation of the First Amendment are DISMISSED with prejudice, leaving only the motion on Plaintiff's Texas Government Code, Chapter 614, Subchapter B claim, which is remanded to state court. It is further

ORDERED that Plaintiff's sole remaining claim, namely, his state law claim that Defendants' termination of Plaintiff's employment was in violation of Texas Government Code §§ 614.021-614.023, which is also the subject of his Motion for Partial Summary Judgment (Document No. 40), is SEVERED from this action and REMANDED to the 240th District Court of Fort Bend County, Texas. A separate Final Judgment will be entered for Defendants on all other claims.

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas, on this 7th day of April, 2014.

/s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES
DISTRICT JUDGE

Fifth Circuit Decisions
Applying "Similarly Situated"
Prima Facie Case Requirement
August 1, 2013 to August 1, 2015

Hoffman v. Baylor Health Care System, 597 Fed.Appx. 231 (5th Cir. 2015) (no prima facie case because no similarly situated nearly identical comparator)

Cooper v. Dallas Police Ass'n, 2015 WL 4071853 at *2 (5th Cir. July 6, 2015) (no prima facie case because no similarly situated nearly identical comparator)

Fowler v. Timber Rock R.R., L.L.C., 2015 WL 4036253 at *1 (5th Cir. July 2, 2015) (no prima facie case because no similarly situated nearly identical comparator)

Boyd v. Corrections Corp. of America, 2015 WL 3827222 at *3 (5th Cir. June 22, 2015) (no prima facie case because no similarly situated nearly identical comparator)

Jackson v. Frisco Ind. School Dist., 2015 WL 3687803 at *6 (5th Cir. June 15, 2015) (prima facie case shown)

Refei v. McHugh, 2015 WL 3622966 at *3-*4 (5th Cir. June 11, 2015) (no prima facie case because no similarly situated nearly identical comparator)

Hinga v. MIC Group, L.L.C., 2015 WL 2084021 at *3-*4 (5th Cir. May 6, 2015) (no prima facie case because no similarly situated nearly identical comparator)

Paske v. Fitzgerald, 785 F.3d 977, 985 (5th Cir. 2015) (no prima facie case because no similarly situated nearly identical comparator)

Scott v. Weber Aircraft, 2015 WL 1746462 at *3 (5th Cir. April 17, 2015) (no prima facie case because no similarly situated nearly identical comparator)

Burton v. Texas Dept. of Criminal Justice, 584 Fed.Appx. 256, 257 (5th Cir. 2014) (no prima facie case because no similarly situated nearly identical comparator)

Niwayam v. Texas Tech. University, 590 Fed.Appx. 351, 357 (5th Cir. 2014) (prima facie case shown)

McGee-Hudson v. AT&T, 587 Fed.Appx. 134, 135 and n. 1 (5th Cir. 2014) (no prima facie case because no similarly situated nearly identical comparator)

Roberts v. Lubrizol Corp., 582 Fed.Appx. 455, 459 (5th Cir. 2014) (no prima facie case because no similarly situated nearly identical comparator)

Spencer v. Schmidt Elec. Co., 576 Fed.Appx. 442, 450-51 (5th Cir. 2014) (no prima facie case because no similarly situated nearly identical comparator)

Watson v. Kroger Texas, L.P., 576 Fed.Appx. 392, 393 (5th Cir. 2014) (no prima facie case because no similarly situated nearly identical comparator)

Smith v. City of St. Martinville, 575 Fed.Appx. 435, 440 (5th Cir. 2014) (prima facie case shown)

Thompson v. Harris County Hosp. Dist., 575 Fed.Appx. 371, 371 (5th Cir. 2014) (prima facie case not disputed)

Calloway v. Health & Human Serv. Com'n, 570 Fed.Appx. 429, 430 (5th Cir. 2014) (no prima facie case because no similarly situated nearly identical comparator)

Griffin v. Kennard Ind. School Dist., 567 Fed.Appx. 293, 294 (5th Cir. 2014) (no prima facie case because no similarly situated nearly identical comparator)

Cardiel v. Apache Corp., 559 Fed.Appx. 284, 289 (5th Cir. 2014) (no prima facie case because no similarly situated nearly identical comparator)

Noble v. Siegler Services, Inc., 554 Fed.Appx. 275, 276 (5th Cir. 2014) (no prima facie case because no similarly situated nearly identical comparator)

Lazarou v. Mississippi State Univserity, 549 Fed.Appx. 275, 281 (5th Cir. 2013) (no prima facie case because no similarly situated nearly identical comparator)

Edwards v. Senatobia Mun. School Dist., 549 Fed. Appx. 259, 261 (5th Cir. 2013) (no prima facie case because no similarly situated nearly identical comparator)

Nguyen v. University of Texas School of Law, 542 Fed.Appx. 320, 323 (5th Cir. 2013) (no prima facie case because no similarly situated nearly identical comparator)

Maestas v. Apple, Inc., 546 Fed.Appx. 422, 427-27 (5th Cir. 2013) (no prima facie case because no similarly situated nearly identical comparator)

Sapp v. Donohoe, 539 Fed.Appx. 590, 596 (5th Cir. 2013) (no prima facie case because no similarly situated nearly identical comparator)

Strahan v. Waste Management, 539 Fed.Appx. 331, 332 (5th Cir. 2013) (no prima facie case because no similarly situated nearly identical comparator)

Glaskox v. Harris County, Tex., 537 Fed.Appx. 525, 528 (5th Cir. 2013) (no prima facie case because no similarly situated nearly identical comparator)