No. 25-3275

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Michael Melgaard,

Plaintiff-Appellant,

v.

Wisconsin Department of Natural Resources et al.,

Defendants-Appellees.

On Appeal from a Final Judgment of the
United States District Court for the Western District of Wisconsin
Case No. 24-cv-561, Hon. James D. Peterson

OPENING BRIEF FOR PLAINTIFF-APPELLANT MICHAEL MELGAARD

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May 6, 2026

Appeal No. 25-3275

In the
United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Michael Melgaard,

Plaintiff – Appellant,

v.

Wisconsin Department of Natural Resources,
Jeremy Peery, and Bryan Harrenstein,

Defendants – Appellees.

On Appeal from the United States District Court
For the Western District of Wisconsin,
The Honorable James D. Peterson, U.S. District Judge, Presiding,
In District Court Case No: 3:24-cv-00561-jdp

Notice of Appearance and Circuit Rule 26.1 Disclosure Statement

Please Take Notice that the undersigned Attorney, Jeff Scott Olson, now appears as lead counsel for Plaintiff-Appellant, Michael

Melgaard, and makes the following disclosures pursuant to Circuit

Rule 26.1:

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Michael Melgaard

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any,

Not Applicable.

and

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

Not Applicable.

Provide information required by FRAP 26.1(b) Organizational Victims in Criminal Cases:

Not applicable.

Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Not applicable.

Dated this Thursday, December 18, 2025.

Respectfully submitted,

Michael Melgaard,

Plaintiff-Appellant,

By

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CERTIFICATE OF SERVICE

I hereby certify that on Thursday, December 18, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Jeff Scott Olson

Jeff Scott Olson

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Appellate Court No: 25-3275

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To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Attorney's Signature: s/ Natasha R. Khan Date: 3/23/2026

Attorney's Printed Name: Natasha R. Khan

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ Becca Steinberg Date: 05/06/2026

Attorney's Printed Name: Becca Steinberg

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ Brian Wolfman Date: 5/6/2026

Attorney's Printed Name: Brian Wolfman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Introduction

Michael Melgaard, a law enforcement officer and career public servant, supported his coworker Jennifer Burrow-Niemeyer's age- and sex-discrimination complaint against the Wisconsin Department of Natural Resources. He encouraged Burrow-Niemeyer to file her complaint, and he provided deposition testimony and documents favorable to her case.

Immediately afterward, Defendants Bryan Harrenstein and Jeremy Peery singled out Melgaard for unfavorable treatment. First, they selectively investigated Melgaard for alleged violations of a COVID-19 policy, while turning a blind eye to other officers' similar conduct. Second, Harrenstein issued Melgaard a stern but opaque Letter of Expectations, which is a key step on the path toward termination. Then, at their earliest chance to do so, Defendants gave Melgaard his first-ever negative performance review. After twenty-seven years with an impeccable record, Melgaard reasonably feared these escalating actions would culminate in termination, so he retired.

Melgaard sued for retaliation, bringing claims under both the First Amendment and Title VII. Despite the evidence linking Melgaard's protected activities to Defendants' retaliatory actions, the district court granted summary judgment to Defendants. In doing so, the district court committed two dispositive legal errors.

First, it disposed of Melgaard's First Amendment claim by holding that Harrenstein and Peery are shielded by sovereign immunity because Melgaard's claim is really against the State. But that's not right because Melgaard sued Defendants in their individual capacities, based on their individual conduct, seeking relief that could be recovered only from them as individuals, not from the State.

Second, the district court erred when it evaluated Melgaard's Title VII claim under the wrong standard: It asked whether Defendants' actions were so severe or pervasive that they altered the terms or conditions of Melgaard's employment, even though Title VII does not impose that requirement for retaliation claims. Instead, Title VII requires only that Defendants' retaliatory actions would have dissuaded a reasonable employee from engaging in protected activity.

Applying the proper standards under both the First Amendment and Title VII, a jury could find that Defendants unlawfully retaliated against Melgaard for his protected speech and activity. This Court should reverse.

Jurisdictional Statement

The district court had jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3). The district court's order granting summary judgment to all Defendants, App. 677-87, and judgment, App. 688, entered on November 24 and November 26, 2025, respectively, disposed

of all of Melgaard's claims. Melgaard timely filed a notice of appeal on December 17, 2025. App. 689-90. This Court has jurisdiction under 28 U.S.C. § 1291.

Issues Presented

I.A. Whether the district court erred in holding that Melgaard's First Amendment claim is barred by sovereign immunity.

B. Whether a jury could find that Harrenstein and Peery retaliated against Melgaard, violating his First Amendment rights.

II. Whether a jury could find that the Department of Natural Resources, through Harrenstein's and Peery's retaliatory actions, violated Title VII.

Statement of the Case

I. Factual background

A. Melgaard spends nearly three decades in public service.

Michael Melgaard worked in law enforcement for twenty-seven years and held supervisory roles for the last eighteen. App. 608 ¶ 3. He was hired as a lieutenant for the Division of Public Safety and Resource Protection of the Wisconsin Department of Natural Resources in 2017. App. 608 ¶ 2.

Melgaard took his duties at the Department seriously. Before the performance evaluation at issue in this suit, he had not received "a single negative rating" in nearly three decades of service. App. 382 ¶ 67.

Melgaard's coworkers described him as a "'by the book' guy" who "follow[s] the guidance … given by his supervisors." App. 343 ¶ 14; App. 348 ¶ 12.

B. Melgaard supports a colleague's discrimination complaint and files a complaint of his own.

In October 2020, Melgaard applied for a promotion to captain within his division. App. 371 ¶ 5. Lieutenants Bryan Harrenstein and Jennifer Burrow-Niemeyer also applied for the same promotion. App. 371-72 ¶¶ 7-8. Harrenstein got the promotion, making him Melgaard's supervisor. App. 190 ¶¶ 2-3; App. 541 ¶ 9. Harrenstein reported to Deputy Chief Warden Jeremy Peery, so Peery was Melgaard's second-level supervisor. *See* App. 202 ¶ 78.

In December 2020, Burrow-Niemeyer filed an age- and sex-discrimination complaint with the Wisconsin Equal Rights Division based on the hiring process for the captain position. App. 547 ¶ 25. Harrenstein became aware of Burrow-Niemeyer's discrimination complaint shortly after it was filed. App. 371-72 ¶ 7.

Melgaard supported Burrow-Niemeyer in her decision to file a discrimination complaint. App. 372 ¶ 10. His initial support included discussing the complaint with her and alerting her to sexist comments made by members of the interview panel. App. 652-54 ¶¶ 134-40. In October 2021, the Equal Rights Division issued an initial determination

that there was probable cause to believe that the Department had discriminated against Burrow-Niemeyer. App. 354 ¶ 13.

Melgaard continued to support Burrow-Niemeyer throughout the prosecution of her complaint. App. 372 ¶ 10. In February and March 2022, Melgaard was subpoenaed to provide records and deposition testimony. App. 378 ¶¶ 43-44. Melgaard gave testimony favorable to Burrow-Niemeyer's claims. App. 378 ¶ 44; App. 652 ¶¶ 132-33. Her case settled shortly thereafter, in May of 2022. App. 378 ¶ 45.

Separately, Melgaard filed his own age-discrimination complaint with the Equal Rights Division in July 2021, alleging that the Department discriminated against him in the same promotional process. App. 544-45 ¶ 18. In January 2022, Melgaard settled his case with the Department, which agreed to pay $25,000 in backpay and attorneys' fees. App. 298-301. In return, Melgaard "agree[d] to file no further claims/complaints against the Department in any venue arising from events prior to this Agreement." App. 299 ¶ 6. The agreement expressly preserved "any rights or claims" arising after the waiver's execution on January 5, 2022. App. 300 ¶ 13.

C. Harrenstein and Peery target Melgaard by investigating him.

The Department's opaque COVID-19 guidance. From August to November 2021, Melgaard received a series of changing COVID-19 guidelines related to vehicle sharing. App. 221; App. 192 ¶ 13; App. 155;

App. 160. On August 24, 2021, Peery emailed all staff "reinstitut[ing] the prohibition of shared vehicle use," attaching guidance that stated there were "[n]o limitations on sharing a vehicle" for those who were fully vaccinated and wearing masks. App. 123, 125. Then, on September 16, Peery directed wardens not to ride in cars together "unless there is a legitimate officer safety need or special circumstance." App. 221. Three days later, Harrenstein emailed to say that ridesharing was permitted only when "absolutely necessary." App. 132.

Department-wide policy also shifted over time. The day after Harrenstein's email, the Department issued guidance requiring supervisor approval before vehicles could be shared. App. 155. Three days later, the Department issued different procedures. App. 160. Staff were permitted to share vehicles when approved by the staff member's Division Chief or when an exemption applied. App. 160. The exemptions included "essential work" with "no other options for transportation" and for trips that were "less than 15 minutes." App. 160. These exemptions could be invoked by employees without supervisor approval. App. 160; App. 551-52 ¶ 37.

Then, on November 15, 2021, a memo was issued to all wardens, including Melgaard, setting forth procedures for the 2021 gun deer season. App. 144. This memo stated that "[w]ardens may ride together if it is an immediate officer safety issue where driving separate is not possible." App. 144.

"Many" Department staff members reported that the COVID-19 guidance was "confusing," especially as it related to ridesharing. App. 346 ¶ 30; *see* App. 344 ¶ 17. The "multiple sources of guidance, changing guidance, and individual interpretations of guidance by [Department] staff" made some of Melgaard's colleagues feel that it was "difficult to keep up with COVID guidance and restrictions." App. 344 ¶ 17.

Because of this confusion, Department staff struggled to follow the guidelines. In fall 2021, for example, Lieutenant Scott Bowe dropped off a warden at the site of a potential baiting violation. App. 344-45 ¶¶ 20-22. Deer baiting poses a serious health concern that the Department wanted to curtail. App. 345 ¶ 27. Bowe informed Harrenstein of the ride. App. 345 ¶ 23. Harrenstein said that "it was okay" and "took no action" against Bowe or the warden who rode with him. App. 345 ¶¶ 23-24.

Another example involved Lieutenant Robin Barnhardt, who shared a vehicle thirty miles each way for four or five days while working security for an event. App. 349-50 ¶¶ 21-27, 30. Peery, who directed that operation, told his team that they "were required to wear masks and keep windows cracked while traveling with two in a vehicle." App. 349-50 ¶¶ 26-28. No one, including Peery, followed that guidance. App. 350 ¶ 28. Although Peery knew officers were violating his instructions, nobody was investigated afterward. *See* App. 350 ¶¶ 30-31.

Melgaard's purported violation. In November 2021, Melgaard's direct subordinate Josh Loining asked Melgaard to drop him off at

several deer-baiting sites. App. 258 at 6:23-7:4. Like other lieutenants, Melgaard viewed bait-site investigations as essential work. App. 629 ¶ 59; App. 345 ¶ 27.

Deer baiting investigations often require a warden to be dropped off to approach the scene undetected. App. 346 ¶¶ 28-29. Melgaard and Loining drove separately to a central location to minimize the length of their shared rides. App. 628 ¶ 55. The two then rode together, so Melgaard could drop off Loining at three or four reported bait sites. App. 164. The two were in the car together for less than an hour throughout the day. App. 258 at 8:25-9:6. No single shared ride lasted longer than ten or fifteen minutes. App. 115. Melgaard and Loining both wore masks and were fully vaccinated. App. 258 at 7:25-8:1.

During their drive, Harrenstein called Melgaard to discuss a leasing issue. App. 559 ¶ 55. Melgaard told Harrenstein that he was about to drop off Loining at a bait site. App. 259 at 10:8-19. Harrenstein did not tell Melgaard that the conduct might violate COVID-19 guidance. App. 259 at 10:20-24; App. 374 ¶ 21.

Hours later, Harrenstein contacted Melgaard and told him that riding with another officer was "not ok" and that he'd have to "run [the incident] up the chain" because it "may have" violated COVID-19 guidelines. App. 196 ¶ 43; App. 374 ¶ 21. That same day, Harrenstein reported Melgaard's conduct, and an internal investigation was opened. App. 633 ¶¶ 72-73.

Investigation and Letter of Expectations. In December 2021, Melgaard was interviewed by an agency investigator, with Harrenstein present. App. 565-66 ¶ 75. A few weeks later, Melgaard was informed that no disciplinary action would be taken. App. 375 ¶ 25.

Around the same time, the Department also investigated Burrow-Niemeyer regarding potential COVID-19 guideline violations. App. 632 ¶ 67. No disciplinary action was taken against her, either. App. 632 ¶ 70. Burrow-Niemeyer and Melgaard were the only wardens investigated for potential COVID-19 guideline violations. App. 578 ¶ 105.

On February 4, 2022, a month after the Department concluded its investigation of Melgaard, Melgaard received a Letter of Expectations. App. 63-64. A Letter of Expectations is issued "to an employee who is exhibiting performance problems that have not been corrected through verbal counseling or other less formal means." App. 171. Letters of Expectations are "not considered discipline" on their own, but they are permanently kept in an employee's personnel file. App. 63. Melgaard's Letter warned that "[f]uture violations … may result in disciplinary action, up to and including termination of employment." App. 64.

Harrenstein called Melgaard that same day to discuss the Letter. App. 581 ¶ 112. During the call, Melgaard noticed Harrenstein's "awkward communication" and asked if he was recording the call. App. 377 ¶ 37; *see* App. 288 at 58:7-9. Harrenstein confirmed that he was recording and stated that Peery had given him permission to do so. App. 581-82 ¶ 114.

Melgaard later requested the recording, but Harrenstein said he was unable to retrieve a copy "due to a technical issue." App. 377 ¶¶ 41-42.

The expectations listed in the Letter had never been raised with Melgaard before the Letter was issued. App. 376 ¶ 30. Melgaard repeatedly asked for clarity about what he did to warrant the Letter. App. 207-10; App. 376-77 ¶¶ 34-35. Harrenstein replied that he thought that he and Melgaard may have been "at an impasse" and did not provide the examples Melgaard had requested. App. 207.

D. Melgaard receives a negative performance review.

On September 30, 2022, Harrenstein completed Melgaard's annual performance review. App. 79. Peery approved the review, and both Harrenstein and Peery signed it. App. 85. Employees can receive any of four ratings: Exceeds Expectations, Solid Performance, Progress Necessary, or Unacceptable Performance. App. 178. Solid Performance is the "fundamental expectation" for employees, App. 178, and the results of the annual review may determine an employee's eligibility for discretionary merit compensation, App. 181. Receiving even two Progress Necessary ratings requires "a conversation with program management and Human Resources." App. 188.

Employees are evaluated in two overarching categories. For the Individual Objectives category, Melgaard received a mix of Exceeds Expectations and Solid Performance ratings. App. 81-85. But in the

Agency-Wide Objectives category, Harrenstein gave Melgaard Progress Necessary ratings in three of five subcategories. App. 79. Receiving three negative ratings required Melgaard to receive an overall Progress Necessary rating. App. 80, 188.

In two subsequent conversations with Harrenstein, Melgaard requested examples of conduct that justified the Progress Necessary ratings. App. 88. Harrenstein proffered some explanations, many of which Melgaard disputed at the time (and all of which he later formally disputed, *see infra* at 13-14).

Harrenstein sought to justify the overall Progress Necessary rating in two ways. First, Harrenstein said that Melgaard's "engagement and support of Division leadership and decisions [was] inconsistent." App. 80, 93. Second, Harrenstein said that Melgaard needed "to accept correction and take full ownership of decisions when issues are addressed." App. 80, 93. When asked for an example, Harrenstein criticized Melgaard for "repl[ying] ... all" to an email in a way that "call[ed] ... out" Harrenstein. App. 93. Melgaard "tried to reassure [Harrenstein] that [his] intent was to not 'call him out' in any way." App. 93. Harrenstein nonetheless "said he was having a difficult time believing that [Melgaard's] response wasn't intentional." App. 93.

In the Decision Making subcategory, Harrenstein cited two reasons for Melgaard's Progress Necessary rating. First, he stated Melgaard "made a decision that went against guidance" and "did not take ownership of

this decision." App. 79, 88. Second, Harrenstein said that Melgaard's team members had reached out to Harrenstein for clarity about the rationale for certain Department policies, adding that Melgaard "should ensure he shows full support of leadership decisions." App. 79-80, 88.

In follow-up conversations, Melgaard explained why he and others interpreted the COVID-19 guidance as they did, and he asked "what more [he] could do and what taking ownership" would look like. App. 89. Harrenstein told Melgaard that "if your supervisor and your supervisor's supervisor say you made a mistake, then you made a mistake." App. 89.

In the Effective Communications category, Harrenstein cited two reasons for the Progress Necessary rating: that Melgaard "struggle[d] at times" in "communicating with his supervisor and upper management" and that he "assumed negative intent" from his supervisors, which "strained" communications. App. 80, 90. Again, Melgaard asked for an explanation. App. 91. Harrenstein stated that he was "tired of [Melgaard] picking away at the words he used rather than listening to the intent of his message." App. 91.

Harrenstein also gave Melgaard a Progress Necessary rating in "Interpersonal Relationships" predominantly because Melgaard "declined involvement in [an ad hoc] committee." App. 80, 92; *see* App. 185. Melgaard disagreed, explaining that he had been "willing to help" with the year-long commitment. App. 92. But because Melgaard was considering retirement, Harrenstein and the committee chair preferred

someone "who could commit to the entire anticipated timeline." App. 92. When Melgaard asked Harrenstein to "correct the untrue claim," Harrenstein refused to discuss the matter and "repeatedly told [Melgaard] to [j]ust rebut [the] performance review." App 223.

E. Melgaard's rebuttal is rejected, and he retires early to avoid being terminated.

On October 14, 2022, Melgaard rebutted his performance review per Department policy. App. 86, 88-93; *see also* App. 181. He contested the "inaccuracies and untrue claims" and requested that the negative ratings be changed. App. 88. Melgaard pointed out that most of Harrenstein's criticisms had never been brought to his attention before the performance review, *see* App. 89-90, 92, despite prior communication from Human Resources that a performance review should never be the first time a subordinate learns of a concern, *see* App. 95; App. 378-79 ¶ 50.

Melgaard also repeatedly pointed out that many of Harrenstein's explanations lacked "substance and foundation." App. 88. For example, Harrenstein had provided no examples for many of Melgaard's purported failures. App. 92.

On December 23, 2022, Melgaard received an email from HR stating that three HR members had reviewed his rebuttal and determined that the performance review was justified. App. 87. HR had not followed up with Harrenstein or conducted further inquiry of any kind. App. 95; App. 204 ¶ 90.

Burrow-Niemeyer—whom Melgaard supported in her age- and sex-discrimination suit, *see supra* at 4-5—suffered a similar fate. Following her discrimination complaint, she received two consecutive negative evaluations, which were her first-ever negative reviews. App. 379-80 ¶¶ 56-58. And she, like Melgaard, unsuccessfully rebutted her negative reviews. App. 380 ¶ 57. Notably, Peery had instructed Burrow-Niemeyer's supervisor to give her negative ratings. App. 380 ¶ 60.

Melgaard believed the actions taken against him were contrived and would escalate to termination. App. 382 ¶ 71. To avoid being fired, he retired. App. 382 ¶ 72. His last day was March 27, 2023. App. 38 ¶ 469.

II. Procedural background

Melgaard sued the Department and two of his supervisors, Harrenstein and Peery, in their individual capacities. Melgaard alleged that (1) Harrenstein and Peery retaliated against him for supporting Burrow-Niemeyer's discrimination complaint in violation of the First Amendment and (2) the Department did the same in violation of Title VII. App. 23-24. Melgaard sought compensatory and punitive damages. App. 24-25.

The district court granted Defendants' motion for summary judgment. App. 677-87. Without reaching the merits, the court held that sovereign immunity bars Melgaard's First Amendment claim. App. 681-86. Although Harrenstein and Peery were sued in their individual capacities,

the district court found they are protected by sovereign immunity because Melgaard's entitlement to a retaliation-free workplace is part of his "employment relationship with the state," so his claims are "effectively against the state." App. 684-86.

The district court found that Melgaard's Title VII claim against the Department failed because he had not shown "severe and pervasive harassment that would affect the terms and conditions" of his employment. App. 686-87.

Summary of Argument

I.A. Sovereign immunity does not bar Melgaard's First Amendment retaliation claim against Defendants Harrenstein and Peery. Under Section 1983, plaintiffs may recover compensatory and punitive damages from government officials in their individual capacities. Only claims demonstrably against the state are barred by sovereign immunity.

Melgaard's claim is not, as the district court thought, against the State because (1) he seeks compensatory and punitive damages from Harrenstein and Peery, rather than backpay from the State; (2) Harrenstein and Peery were personally responsible for the retaliatory acts; and (3) Melgaard's right to be free from retaliation arises from the Constitution, not the terms of his employment contract. In holding otherwise, the district court effectively immunized state officials against all individual-capacity constitutional claims brought by state employees.

Its sweeping rule conflicts with Supreme Court precedent that has allowed state employees to bring claims in such circumstances.

B. With sovereign immunity out of the picture, a jury could find that Harrenstein and Peery retaliated against Melgaard, violating the First Amendment. Defendants do not contest that Melgaard's speech was protected or that he suffered three deprivations likely to deter speech: a targeted investigation, a Letter of Expectations, and a negative performance evaluation. Disparate treatment, suspicious timing, and ambiguous statements all suggest that Melgaard's protected speech motivated Defendants to retaliate. Defendants' purported reasons for their actions are pretextual because Defendants violated internal Department policies, behaved suspiciously, and treated Melgaard differently from other employees who acted similarly.

II. The district court erred in evaluating Melgaard's Title VII retaliation claim. It improperly required Melgaard to show that the Department's adverse actions changed the terms and conditions of his employment. That's the right standard for a discrimination claim but the wrong standard for the retaliation claim Melgaard actually brought.

Under the right standard, a jury could find that Defendants' conduct amounted to unlawful retaliation. First, Defendants' retaliatory actions were materially adverse to Melgaard because they would dissuade a reasonable worker from making or supporting a charge of discrimination. The investigation, Letter of Expectations, and negative performance

review—when viewed independently or collectively—would dissuade a reasonable employee from speaking up. And the causation analysis from the First Amendment context applies equally here: A jury could find that Defendants would not have taken these actions against Melgaard if he had not supported Burrow-Niemeyer's claims in the first place.

Standard of Review

The district court's grant of summary judgment is reviewed de novo, with all inferences construed in favor of Melgaard, the non-moving party. *Culver v. Gorman & Co.*, 416 F.3d 540, 545 (7th Cir. 2005).

Argument

I. The district court erred in granting Defendants summary judgment on Melgaard's First Amendment claim.

A. Melgaard's First Amendment claim is not barred by sovereign immunity.

Melgaard's First Amendment retaliation claim seeks monetary relief from Defendants Harrenstein and Peery in their individual capacities. Harrenstein and Peery—not the State—are the real parties in interest. Contrary to the district court's holding, sovereign immunity does not bar this claim.

1. Melgaard's claim is against Defendants in their individual capacities, not against the State.

Sovereign immunity does not generally preclude suits for damages against state actors sued in their individual capacities. *Hafer v. Melo*, 502

U.S. 21, 30 (1991). But sovereign immunity may bar individual-capacity suits "when 'the state is the real, substantial party in interest,'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) (citation omitted)—that is, when an individual-capacity suit "*demonstrably* has the *identical* effect as a suit against the state," *Luder v. Endicott*, 253 F.3d 1020, 1023 (7th Cir. 2001).

The district court held that Melgaard's claims are barred by sovereign immunity, relying on two decisions of this Court: *Omosegbon v. Wells*, 335 F.3d 668 (7th Cir. 2003), and *Haynes v. Indiana University*, 902 F.3d 724 (7th Cir. 2018). App. 682-86. In both cases, professors sued state university officials after the professors' employment contracts were not renewed. Melgaard's case is different from *Omosegbon* and *Haynes* because of (a) the type of relief sought, (b) Defendants' personal involvement, and (c) the source of Melgaard's rights.

a. Type of relief. "Whether a state is the real party in interest depends upon the nature of the relief" at issue. *New Orleans Towing Ass'n v. Foster*, 248 F.3d 1143 at *5 (5th Cir. 2001) (table). If "money will flow from the state treasury," rather than from the individual defendant, sovereign immunity bars the claim. *Luder*, 253 F.3d at 1024; *see Pennhurst*, 465 U.S. at 101 n.11.

Melgaard's suit seeks compensatory and punitive damages for "injury to his personal reputation" and "mental and emotional distress."

App. 24-25 ¶¶ 601-602. That requested relief is distinct from backpay arising from contract.[1]

Far from coming from the "state treasury," the compensatory damages that Melgaard seeks must be taken "from the personal assets of the individual[s]." *Melo v. Hafer*, 912 F.2d 628, 635 (3d Cir. 1990), *aff'd*, 502 U.S. 21 (1991); *see also Negron-Almeda v. Santiago*, 528 F.3d 15, 26 (1st Cir. 2008). The same is true of punitive damages, which can "be recovered against a government actor only in an individual capacity suit." *Hill v. Shelander*, 924 F.2d 1370, 1374 (7th Cir. 1991); *see Smith v. Wade*, 461 U.S. 30, 35-36 (1983).

Backpay is different. "By definition, backpay is an award against an employer." *Negron-Almeda*, 528 F.3d at 26; *see Lenea v. Lane*, 882 F.2d 1171, 1178 (7th Cir. 1989). Melgaard's employer is the State. Because backpay is based on an employment contract, it "*requires* the payment of funds from the state's treasury." *Lenea*, 882 F.2d at 1178 (emphasis added).

So, although "backpay as such cannot be imposed upon an individual-capacity defendant, a successful plaintiff is nonetheless entitled to receive compensatory damages against such a defendant." *Negron-*

[1] Melgaard's Second Amended Complaint sought relief for lost income as well. App. 24 ¶ 601. Melgaard seeks that relief only from the Department through his Title VII claim. Melgaard does not seek backpay in connection with his Section 1983 claim.

Almeda, 528 F.3d at 26. The district court was therefore wrong to conclude that "the type of relief doesn't matter." App. 685.

The district court also erred in concluding that this case is "identical … in all material respects" to *Omosegbon* and *Haynes*. App. 684. In *Omosegbon*, a professor brought constitutional and breach-of-contract claims against administrators after a university declined to renew his probationary teaching contract. 335 F.3d at 671. Omosegbon sought "backpay and other forms of monetary compensation based on an employment contract," not compensatory and punitive damages as here. *Id.* at 673. Similarly, in *Haynes*, a professor's denial-of-tenure claim was barred because he sought "monetary relief for an injury relating to his employment" with a university. 902 F.3d at 732.[2]

Omosegbon expressly grounded its holding in the form of relief sought, reasoning that when a plaintiff seeks backpay, it is "inescapable that any resulting judgment will be paid by the state." 335 F.3d at 673. But because compensatory damages may be recovered only from the individual defendant, the damages Melgaard seeks cannot possibly come from the State of Wisconsin. *See Tanner v. Bd. of Trs. of Univ. of Ill.*, 2018 WL 1161140, at *9 (C.D. Ill. Mar. 5, 2018).

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[2] Although Haynes's complaint also sought compensatory damages, Compl. at 20, *Haynes v. Ind. Univ.*, 2017 WL 3243895 (S.D. Ind. July 31, 2017), that fact played no role in this Court's reasoning, *Haynes*, 902 F.3d at 732. In any event, *Haynes* is distinguishable for other reasons discussed below (at 23-24).

Melgaard's case is not "identical" to *Omosegbon* because Melgaard is seeking a different type of relief. *Contra* App. 684. In that circumstance, district courts in this Circuit have come to the same conclusion: Section 1983 suits that seek compensatory and punitive damages from state officials in their individual capacities can proceed. *See, e.g.*, *Sizyuk v. Purdue Univ.*, 2024 WL 68282, *4 (N.D. Ind. Jan. 5, 2024); *Gibson v. Ind. State Pers. Dep't,* 2020 WL 1956120, at *4 (S.D. Ind. Apr. 21, 2020); *Reinebold v. Ind. Univ. at S. Bend*, 2019 WL 1897288, at *2-3 (S.D. Ind. Apr. 25, 2019).

As the district court acknowledged, the Wisconsin Legislature's decision to indemnify state employees in some circumstances is irrelevant to this analysis. App. 685; *see Luder,* 253 F.3d at 1022-23; Wis. Stat. § 895.46(1)(a). Indemnification does not create an Eleventh Amendment bar because it "is the voluntary choice of the state." *Luder*, 253 F.3d at 1023. "[I]t would be absurd if all a state had to do to put its employees beyond the reach of section 1983 and thereby make the statute ineffectual … was to promise to indemnify state employees for any damages awarded in such a suit." *Duckworth v. Franzen*, 780 F.2d 645, 651 (7th Cir. 1985), *abrogated on other grounds as noted in Burton v. Downey*, 805 F.3d 776, 785 (7th Cir. 2015). Absent indemnification, there is no other mechanism by which damages awarded to Melgaard would be paid from the state treasury. *See Sizyuk*, 2024 WL 68282, at *4; *Patton v. Ind. Univ. Bd. of Trs.*, 2022 WL 3716522, at *10 (S.D. Ind. Aug. 29,

2022); *Woodrum v. Ill. Dep't of Transp.*, 2025 WL 2086042, at *8-9 (C.D. Ill. July 24, 2025).

b. Personal involvement of individual Defendants. In his Section 1983 claim, Melgaard alleges retaliation by Harrenstein and Peery, not the Department as an entity. Melgaard can recover from the individual Defendants just as he would from a police officer, prison guard, or any state actor who harmed him. This distinction is another reason this case differs from *Omosegbon* and *Haynes*.

Like every plaintiff seeking compensatory damages, Melgaard must demonstrate Harrenstein's and Peery's personal involvement in the unconstitutional acts. *See Kelly v. Mun. Cts. of Marion Cnty.*, 97 F.3d 902, 909 (7th Cir. 1996). This requirement prevents plaintiffs from seeking compensatory damages solely to plead around sovereign immunity. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997).

Melgaard has satisfied that requirement. He brings retaliation claims arising from specific interactions with the individual Defendants. Recall that Harrenstein and Peery ordered the investigation into Melgaard, App. 196 ¶ 43, and Harrenstein himself wrote Melgaard's performance review, which Peery approved, App. 79, 85; App. 378 ¶ 46. Tellingly, these violations were perpetrated entirely by the individual Defendants, not the Department as an entity. This fact distinguishes this case from *Omosegbon* and *Haynes*, where the nonrenewal of a teaching position and denial of tenure were logically understood as the actions of state entities,

not individuals acting in their personal capacities. *See Omosegbon*, 335 F.3d at 673; *Haynes*, 902 F.3d at 732.

Confirming the point, Melgaard could not seek the same relief from Harrenstein's and Peery's successors, who were not personally involved in the deprivations. It would make no sense to hold a future supervisor accountable for Harrenstein's and Peery's actions. Only Harrenstein and Peery can answer for their constitutional violations.

c. Source of rights. Melgaard brought a constitutional claim, not a breach-of-contract claim. That, too, distinguishes this case from *Haynes*. *See Sizyuk*, 2024 WL 68282, at *4.

There, a university professor claimed he was denied tenure based on his race. *Haynes*, 902 F.3d at 728. He sued university administrators, seeking backpay and other monetary benefits guaranteed under his contract. *Id.* at 732. The root issue was whether racial discrimination infected the tenure process provided for by the contract. *Id.* at 728-29.

Here, Melgaard seeks to remedy constitutional and statutory violations by Harrenstein and Peery, not to redress "violations of a contract to which [Defendants] were not parties." *Doe v. Purdue Univ.*, 2019 WL 1369348, at *3 (N.D. Ind. Mar. 25, 2019). When a person exercises his First Amendment rights, as Melgaard did, state officials may not retaliate against him, regardless of whether that person had a contract with the state.

The district court's reasoning in *Mahmoud v. Board of Regents of the University of Wisconsin System*, 2026 WL 242087 (W.D. Wis. Jan. 29, 2026), is instructive. Mahmoud brought both a denial-of-tenure claim and a constructive-discharge claim. *Id.* at *7. The court held that his denial-of-tenure claim was barred under *Haynes* because he sought "only the benefit of his employment relationship with the state." *Id.* But Mahmoud's constructive-discharge claim could proceed because it was based on an individual defendant "personally mistreat[ing] him." *Id.* As described above (at 22-23), Melgaard likewise claims that Harrenstein and Peery personally mistreated him.

This distinction is especially salient where, as here, the plaintiff claims retaliation. The *method* of retaliation does not change the ultimate *source* of the right. Melgaard does not claim that Harrenstein or Peery breached his employment contract. Although the retaliation occurred in the employment setting, Melgaard claims that Harrenstein and Peery violated the First Amendment. *See Isabell v. Trs. of Ind. Univ.*, 432 F. Supp. 3d 786, 795 (N.D. Ind. 2020). So, the district court was wrong to say that Melgaard's contract is what "entitled him to a retaliation-free work environment." App. 684. The Constitution, not Melgaard's employment contract, is what entitled him to a retaliation-free work environment.

2. The district court's holding conflicts with Supreme Court precedent and would undermine Section 1983.

The district court understood *Omosegbon* and *Haynes* to stand for the broad principle that "sovereign immunity bars a state-employed plaintiff from bringing individual-capacity claims against state-employed supervisors or coworkers who deprived him of rights, benefits, or opportunities arising from his employment relationship with the state." App. 684.

This expansive holding conflicts with the Supreme Court's decision in *Hafer v. Melo*, 502 U.S. 21 (1991). In *Hafer*, state-employed plaintiffs sued the state auditor in her individual capacity, claiming that she fired them in retaliation for being affiliated with her political opponent. *Id.* at 23. The plaintiffs sought compensatory and punitive damages but not backpay. *See Melo v. Hafer*, 912 F.2d 628, 632 (3d Cir. 1990), *aff'd*, 502 U.S. 21 (1991). The Supreme Court held that the plaintiffs' claims were not barred by sovereign immunity. *Hafer*, 502 U.S. at 30-31.

Hafer would be wrong according to the district court. In *Hafer*, the plaintiffs were state employees bringing individual-capacity claims against their state-employed supervisor who fired them. *See Hafer*, 502 U.S. at 23. Under the district court's sweeping rule, that type of suit would be barred by sovereign immunity. *See* App. 681-86. Any work-related Section 1983 claim brought by a state employee would be

precluded—regardless of the type of relief sought, defendants' personal involvement, or the source of the plaintiff's rights. That result "would collapse this circuit's distinction under the Eleventh Amendment, not to mention *Hafer*." *Isabell*, 432 F. Supp. 3d at 795.

The district court's rule would also undermine Section 1983. "Through § 1983 Congress sought 'to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position.'" *Hafer*, 502 U.S. at 27 (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)). So, the Supreme Court declined to "absolutely immunize state officials from personal liability for acts within their authority." *Id.* at 28.

But under the district court's rule, state officials would enjoy blanket constitutional immunity with respect to damages suits brought by their employees. Recovery would be limited to reinstatement alone through official-capacity suits. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989). That limitation would subvert Section 1983's goals of deterring the deprivation of federal rights by state actors and providing compensation when deprivations occur. *See Carey v. Piphus*, 435 U.S. 247, 255-57 (1978).

B. A jury could find that Defendants violated the First Amendment when they retaliated against Melgaard.

Because sovereign immunity does not bar Melgaard's First Amendment claim, this Court should reverse and remand for the district

court to consider the merits of this claim in the first instance. If the Court wishes to address the merits, however, it should hold that a jury could find Harrenstein and Peery retaliated against Melgaard for his protected speech.

"To prove a First Amendment retaliation claim, a public employee must establish three elements: first, that [he] engaged in constitutionally protected speech; second, that [he] suffered a deprivation likely to deter protected speech; and third, that [his] protected speech was a motivating factor in the deprivation." *Harnishfeger v. United States*, 943 F.3d 1105, 1112 (7th Cir. 2019). Below, Defendants conceded the first two elements. App. 315.

Those two elements are clearly satisfied. First, Melgaard alleges two instances of constitutionally protected speech: encouraging his coworker Burrow-Niemeyer to file a discrimination complaint, App. 304-05, 372 ¶ 10, and providing documents and sworn testimony to bolster her claim, App. 305, 378 ¶¶ 43-44. Melgaard and the public share an interest in opposing discrimination, and that interest is not outweighed by any countervailing government interest. *See Marshall v. Porter Cnty. Plan Comm'n*, 32 F.3d 1215, 1219-20 (7th Cir. 1994); *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006). Second, Melgaard suffered three deprivations likely to deter his speech: (1) the formal investigation regarding noncompliance with COVID-19 policies, App. 372-73 ¶ 11; (2) the Letter of Expectations, App. 375-76 ¶¶ 28-30; and (3) his first-ever negative performance review,

App. 378 ¶¶ 46-48. When viewed either independently or collectively, these actions would deter a reasonable public employee's speech. *See Massey v. Johnson*, 457 F.3d 711, 720 (7th Cir. 2006).

That leaves the third element: causation. A plaintiff must prove "by a preponderance of the evidence that his or her protected activity was a motivating factor in the defendants' retaliatory action[s]." *Spiegla v. Hull*, 371 F.3d 928, 942 (7th Cir. 2004), *abrogated on other grounds by Spiegla v. Hull*, 481 F.3d 961 (7th Cir. 2007). "To clarify, a motivating factor does not amount to a but-for factor or to the only factor, but is rather a factor that motivated the defendant's actions." *Id.* at 942. Here, a jury could find that Defendants knew about Melgaard's protected speech and that the deprivations suffered are "not wholly unrelated" to that speech. *Kidwell v. Eisenhauer*, 679 F.3d 957, 966 (7th Cir. 2012) (citation omitted).

1. Melgaard's protected speech was a motivating factor in Harrenstein's and Peery's actions.

A jury could find a causal link between Melgaard's protected speech—supporting Burrow-Niemeyer's complaint—and each deprivation he suffered. To demonstrate causation, Melgaard can use "circumstantial evidence," including "suspicious timing, disparate treatment of similarly situated entities, ambiguous statements and the like." *Minocqua Brewing Co. v. Hess*, 160 F.4th 849, 855 (7th Cir. 2025). Suspicious timing alone may be insufficient, but when combined with other evidence, it can

establish causation. *Culver v. Gorman & Co.*, 416 F.3d 540, 546 (7th Cir. 2005).

Disparate treatment. Defendants justified their negative treatment of Melgaard by claiming that he violated a COVID-19 policy that forbade officers from ridesharing in some circumstances. App. 372-73 ¶¶ 11, 13. Burrow-Niemeyer was investigated for the same reason. App. 632 ¶ 67.

But four "otherwise similarly situated individuals not engaged in the same sort of protected speech" were not investigated. *Nieves v. Bartlett*, 587 U.S. 391, 407 (2019); App. 372-75 ¶¶ 11, 13, 22-24. Quite the opposite. Harrenstein reassured one officer that ridesharing was okay. App. 345 ¶¶ 21-24. Peery authorized two other officers to ride in the same car, as long as they wore masks. App. 375 ¶ 24. But Peery then observed these two officers disobeying his instructions—riding together while not wearing masks—and he did nothing. App. 375 ¶ 24. Peery himself even rode with another warden without a mask. App. 350 ¶ 28.

The only two people subjected to negative treatment were Melgaard and Burrow-Niemeyer—the only two people who engaged in protected speech. These other officers did not receive a formal investigation, a Letter of Expectations, or a negative performance review. App. 346 ¶ 31; App. 374-75 ¶¶ 22-24, 28. Defendants' inconsistent behavior suggests that Melgaard's and Burrow-Niemeyer's protected speech motivated Defendants' actions.

Suspicious timing. After Melgaard began supporting Burrow-Niemeyer's discrimination claim, Melgaard experienced three negative employment actions in one year. App. 381 ¶ 64. This tight sequence of events indicates that Harrenstein and Peery were motivated by Melgaard's support of his co-worker. *See Kingman v. Fredrickson*, 40 F.4th 597, 601 (7th Cir. 2022). And that sequence followed twenty-seven years during which Melgaard had never been investigated or received any negative feedback about his work. App. 382 ¶ 67. When an employee has a "flawless employment record," an "employer's sudden dissatisfaction with an employee's performance after that employee engaged in a protected activity may constitute circumstantial evidence of causation." *Culver*, 416 F.3d at 546.

The retaliation began after Melgaard supported Burrow-Niemeyer in filing a discrimination complaint and the Wisconsin Equal Rights Division determined that she may have a winning claim. App. 372 ¶¶ 9-10; App. 354 ¶ 13. The month after that finding, Melgaard and Burrow-Niemeyer were individually investigated. App. 372-73 ¶¶ 11, 15-16. Several months after Melgaard began supporting Burrow-Niemeyer, he was due for his next annual performance review. App. 378 ¶¶ 44-46. At this "first opportunity" to review Melgaard's performance, Harrenstein retaliated by reviewing Melgaard negatively. *Lesiv v. Ill. Cent. R.R. Co.*, 39 F.4th 903, 920 (7th Cir. 2022).

The timing of the negative reviews is especially probative given Melgaard's and Burrow-Niemeyer's otherwise sterling work history. Melgaard and Burrow-Niemeyer had worked as officers for decades with zero negative ratings. App. 378 ¶ 48; App. 380 ¶ 58. Then, Melgaard and Burrow-Niemeyer filed and supported each other's discrimination claims. App. 371-72 ¶¶ 6, 9. And, then, they both received their first-ever negative performance ratings. App. 378-80 ¶¶ 47-48, 56, 58.

Ambiguous justifications. After receiving the Letter of Expectations, Melgaard requested clarification about what prompted it. App. 376-77 ¶ 34. He received just one response: "It was clear during the investigation that you did not fully understand your roles and responsibilities." App. 376-77 ¶ 34. It is unclear which "roles" and "responsibilities" Melgaard had failed to understand. Ambiguous statements, like the response Melgaard received, fail to provide a plaintiff with concrete justifications for defendants' conduct. They can therefore support an inference of causation. *See FKFJ, Inc. v. Village of Worth*, 11 F.4th 574, 586 (7th Cir. 2021). Melgaard requested clarification at least four more times, but he never received any explanation of the roles and responsibilities that he allegedly had not understood. App. 377 ¶ 35.

Defendants' knowledge of protected activity. Defendants argue that they couldn't have retaliated because they didn't know about Melgaard's protected activity. App. 316-18. But that issue is disputed.

Compare App. 371-72 ¶ 7, *with* App. 316-18. So, it must be decided by a jury.

Melgaard alleges that he had a phone call with Harrenstein in June or July 2021. App. 371-72 ¶ 7. Harrenstein said "he was informed about and thus aware" of Burrow-Niemeyer's discrimination complaint. App. 371-72 ¶ 7. And Harrenstein said he "didn't need to know any details about anything going on" with Melgaard that was "related to" Burrow-Niemeyer's case. App. 371-72 ¶ 7. Because Harrenstein suggested that Melgaard was somehow "related to" Burrow-Niemeyer's case, a jury could find that Harrenstein thought Melgaard was involved.

A jury could also believe that Harrenstein would have spoken with his boss, Peery, about this phone call between Melgaard and Harrenstein. After all, Burrow-Niemeyer's discrimination complaint was about Peery's supervision of the hiring process. App. 371-72 ¶¶ 7, 9. A court "may invest [Peery] with knowledge of the facts known to [his] subordinate officers." *Seiser v. City of Chicago*, 762 F.3d 647, 654 (7th Cir. 2014).

A jury could also infer knowledge of Melgaard's protected speech based on the sequence of events. Harrenstein and Peery suddenly changed their treatment of Melgaard after he began supporting Burrow-Niemeyer, as already explained (at 30-31).

At minimum, Harrenstein and Peery knew about Melgaard's protected activity prior to issuing the negative performance review. In March 2022, Melgaard provided documents and deposition testimony for Burrow-

Niemeyer's case. App. 378 ¶¶ 43-44. Melgaard's testimony directly implicated Peery. App. 454-55. By October, when performance reviews were released, this testimony was a matter of record and Burrow-Niemeyer's case had been settled, so Peery and Harrenstein likely would have known about Melgaard's supportive testimony in Burrow-Niemeyer's case. App. 378 ¶¶ 45-46; App. 231.

2. A jury could find that the purported justifications for Defendants' actions are pretextual.

Once Melgaard has made the "threshold showing" that his protected speech was a motivating factor in Defendants' retaliatory actions, *Massey*, 457 F.3d at 717, the burden then shifts to Defendants to "produce[] evidence that the same decision would have been made in the absence of the protected speech," *Milliman v. County of McHenry*, 893 F.3d 422, 431 (7th Cir. 2018) (quoting *Thayer v. Chiczewski*, 705 F.3d 237, 251 (7th Cir. 2012)). Then, "the burden shifts back to the plaintiff to demonstrate that the proffered reason was pretextual and that the real reason was retaliatory animus." *Id.* (quoting *Thayer*, 705 F.3d at 251).

"Often, the same evidence used to establish the prima facie case is sufficient to allow a jury to determine" that Defendants' stated reasons for their deprivations were a "mere front for an ulterior, unlawful motive." *Valentino v. Village of South Chicago Heights*, 575 F.3d 664, 673 (7th Cir. 2009). Here, that evidence starts and ends the inquiry. Defendants' selective enforcement of Department rules against

Melgaard, but not "similarly situated" officers, establishes pretext. *Minocqua Brewing Co.*, 160 F.4th at 855. It's hard to imagine any "legitimate and persuasive justification" for this targeted behavior. *Massey*, 457 F.3d at 716.

Defendants attempt to explain why their actions would have been the same regardless of Melgaard's protected speech. App. 318-24. But a jury could find that the "weaknesses, implausibilities, inconsistencies, or contradictions" in Defendants' asserted reasons are "unworthy of credence." *Parker v. Brooks Life Sci., Inc.*, 39 F.4th 931, 938 (7th Cir. 2022) (citation omitted).

Investigation and Letter of Expectations. Harrenstein and Peery argue that they had to investigate Melgaard because he allegedly violated the policy *after* they had received a directive requiring them to investigate staff who didn't comply with COVID-19 policies. App. 318-21. But that reasoning doesn't hold up because the only two people who were investigated were Melgaard and Burrow-Niemeyer. App. 373 ¶¶ 13, 15; App. 374-75 ¶¶ 22-24. And the directive on which Defendants rely wasn't issued until *after* the investigation of Burrow-Niemeyer was opened. *See* App. 373 ¶ 15; App. 219 ¶ 44.

Moreover, a jury could find that Harrenstein's and Peery's "proffered reason was … a lie." *Adebiyi v. S. Suburban Coll.*, 98 F.4th 886, 892 (7th Cir. 2024) (quoting *Parker*, 39 F.4th at 937-38). Despite Defendants' contrary accusations, Melgaard didn't violate the rules: His shared rides

were all under fifteen minutes, falling under one of the rule's exceptions. App. 51 ¶ 41; App. 160.

Regardless, Defendants' first step shouldn't have been issuing the Letter of Expectations. The Department's Policy Manual carefully circumscribes that a Letter may be issued only when an employee's performance problems "have not been corrected through verbal counseling or other less formal means." App. 171. But Defendants didn't follow that Policy: Melgaard hadn't received any verbal counseling or less formal communications prior to this Letter. App. 376 ¶ 30. "[A]n employer's failure to follow its own internal employment procedures can constitute evidence of pretext." *Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712, 727 (7th Cir. 2005).

When Melgaard spoke with Harrenstein about the Letter over the phone, Harrenstein secretly recorded the call, providing additional evidence of pretext. App. 377 ¶¶ 37-39, 41-42. This secret recording of a colleague was "unusual conduct." *Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dep't*, 510 F.3d 681, 693 (7th Cir. 2007). When Melgaard later requested the recording, Harrenstein said he couldn't provide it because of an unspecified "technical issue." App. 377 ¶¶ 41-42. From this "suspicious … behavior," *Shreffler v. City of Kankakee*, 2024 WL 1826976 at *9 (7th Cir. Apr. 26, 2024), a jury could infer that Harrenstein was trying to build a record that would implicate Melgaard.

Finally, Harrenstein and Peery were unable to give any substantive response to Melgaard's questions about the Letter. As discussed (at 31), Melgaard requested clarification at least four times. App. 376-77 ¶¶ 34-35. But he never heard back beyond a single cursory response. App. 376-77 ¶¶ 34-35. These weaknesses in Defendants' reasoning provide additional evidence of pretext.

Negative performance review. Defendants say Melgaard received a negative review because his performance was poor. App. 323. And they maintain that they provided "detailed justifications" for the ratings. App. 323. But many of those reasons had never been mentioned to Melgaard before. Taking disciplinary action, after "failing to utter a word" to the employee about performance concerns, can be evidence of pretext. *Peirick*, 510 F.3d at 693. In other words, there is a "question of fact concerning the legitimacy" of Defendants' stated rationale. *Id.*

Defendants argue that HR's independent review of Melgaard's performance evaluation "makes it clear" that the negative ratings "were not retaliatory." App. 324. That's wrong. When Melgaard appealed the negative ratings, he provided specific documentation that rebutted the evaluation's unfounded claims. App. 379 ¶¶ 52-53. The relevant Department policy says that HR must initiate an "independent review of the evaluation in question." App. 181. Yet, HR did not request any additional information or interview anybody about the performance ratings. App. 379 ¶¶ 54-55. It's difficult to understand how HR personnel

could know the ratings were fair if they didn't even attempt to investigate whether Harrenstein's evaluation was accurate. Defendants argue that HR had "no vested interest in the outcome of Melgaard's evaluation." App. 323. But that's not the point. HR's rubber stamp doesn't legitimate Harrenstein's and Peery's proffered reasons for the negative performance evaluation. *Contra* App. 323.

All told, "the persuasiveness of an employer's non-retaliatory explanation" is "for the finder of fact to assess." *Massey*, 457 F.3d at 719 (quoting *Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir. 1997)). Summary judgment should be granted for the moving party only when "th[is] court can say without reservation that a reasonable finder of fact would be compelled to credit the employer's" stated motivations. *Id.* (quoting *Venters*, 123 F.3d at 973). Because a reasonable fact finder could discredit Defendants' reasons for the investigation, Letter of Expectations, and negative performance review, Melgaard's First Amendment claim should go to trial.

II. A jury could find that Defendants violated Title VII when they retaliated against Melgaard.

Melgaard's speech was also protected activity under Title VII. Employers violate Title VII when they retaliate against employees who, like Melgaard, have supported charges of discrimination. Title VII's antiretaliation provision sweeps broadly, protecting employees who oppose unlawful employment practices or participate in an investigation,

proceeding, or hearing. 42 U.S.C. § 2000e-3(a); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006).

"To survive summary judgment on a Title VII retaliation claim, a plaintiff must produce evidence from which a reasonable juror could find that: (1) [he] engaged in a statutorily protected activity; (2) [he] suffered an adverse employment action; and (3) there is a causal link between the two." *Adebiyi v. S. Suburban Coll.*, 98 F.4th 886, 891 (7th Cir. 2024) (citation omitted). Defendants do not contest that Melgaard engaged in protected activity when he supported Burrow-Niemeyer's discrimination complaint. App. 315, 328; App. 378 ¶¶ 43-44; *see Crawford v. Metro. Gov't of Nashville and Davidson Cnty.*, 555 U.S. 271 (2009).

The only disputed elements are whether Melgaard suffered an adverse employment action and whether a causal link connects his protected activity and the adverse action. A jury could find that both elements are satisfied.

A. Melgaard suffered a materially adverse employment action.

Under Title VII, employers unlawfully retaliate if they take "materially adverse" actions, meaning actions that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe. Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (citation omitted). "[M]aterially adverse" actions are "not limited to discriminatory actions that affect the terms and conditions of

employment." *Id.* at 64; *see Szymanski v. County of Cook*, 468 F.3d 1027, 1029 (7th Cir. 2006). As we now explain, the district court erred by failing to apply the *Burlington Northern* standard.

Under the proper standard, a reasonable jury could find that the Department's actions were materially adverse. After twenty-seven years with a sterling employment record, Melgaard faced an escalating series of reprimands and consequences that suggested his termination was imminent. A reasonable person in his position would be deterred from speaking up.

1. The district court failed to apply *Burlington Northern*'s "materially adverse" standard.

The district court did not evaluate the Department's actions against Melgaard under the "materially adverse" framework that *Burlington Northern* requires. 54 U.S. at 68. Instead, it reasoned that "[t]he cumulative effect [of the Department's actions] is best understood as a retaliatory hostile work environment claim rather than a retaliation claim." App. 686. The court then analyzed Melgaard's claim under the "severe or pervasive" test for hostile-work-environment discrimination claims, requiring him to "show that [the Department's] actions were 'so severe or pervasive as to affect the terms and conditions of employment.'" App. 686 (quoting *Johnson v. Advoc. Health & Hosps. Corp.*, 892 F.3d 887, 901 (7th Cir. 2018)). It concluded that the "terms and conditions of Melgaard's employment never changed." App. 687.

But Melgaard has alleged Title VII *retaliation*, so "severe or pervasive" is the wrong test. Title VII's antiretaliation provision prohibits discrimination against an employee who has "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3(a). Section 2000e-3(a) does not contain the terms-or-conditions language that animates the antidiscrimination provision. *Compare id.*, *with id.* § 2000e-2(a). So, a materially adverse action need not affect the terms or conditions of employment and need be only "serious enough to dissuade a reasonable employee from engaging in protected activity." *Poullard v. McDonald*, 829 F.3d 844, 858 (7th Cir. 2016).

In Melgaard's case, the district court disregarded this firmly established rule because Melgaard alleged a series of retaliatory events, not just one. App. 686. In the discrimination context, courts look to whether instances of hostility add up to a change in the terms or conditions of employment. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). But a *retaliatory* hostile-work-environment claim is a retaliation claim, so *Burlington Northern*'s standard for material adversity applies.

The courts of appeals overwhelmingly agree. Recognizing the difference between discrimination under Section 2000e-2(a) and retaliation under Section 2000e-3, these courts have held that the "severe

or pervasive" test is "appropriate for hostile work environment claims under Title VII's *substantive* provision," but "does not apply to *retaliation* claims." *Stratton v. Bentley Univ.*, 113 F.4th 25, 42-44 (1st Cir. 2024); *see Carr v. N.Y. City Transit Auth.*, 76 F.4th 172, 181 (2d Cir. 2023); *Moore v. City of Philadelphia*, 461 F.3d 331, 341-42 (3d Cir. 2006); *Laurent-Workman v. Wormuth*, 54 F.4th 201, 213 (4th Cir. 2022); *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 862 (11th Cir. 2020) (per curiam); *but see Menoken v. Dhillon*, 975 F.3d 1, 5-6 (D.C. Cir. 2020) (relying on string of pre-*Burlington Northern* cases to hold that cumulative retaliation must affect terms or conditions of employment).

For this reason alone, this Court should reverse and remand Melgaard's Title VII claim for application of the correct test.

2. Melgaard suffered materially adverse actions.

Shortly after supporting Burrow-Niemeyer's complaint, Melgaard was investigated for COVID-19 policy violations and issued a Letter of Expectations. The Letter warned him that he risked discipline and termination. And it was followed up with Melgaard's first-ever negative review, which made those consequences even more concrete. These actions would dissuade a reasonable worker from supporting a charge of workplace discrimination.

Letter of Expectations. After investigating him, Defendants issued Melgaard a Letter of Expectations. Despite being considered non-

disciplinary, the Letter warned Melgaard that it would be permanently retained in his file. App. 63. And it admonished Melgaard for his "failure" to interpret departmental guidance and warned him that any future violations would "result in disciplinary action, up to and including termination of employment." App. 63-64.

The Letter threatened severe consequences that would dissuade an employee from opposing their employer's discriminatory conduct or supporting a charge against them. It had the potential to impact future job opportunities. App. 62-63; *see O'Neal v. City of Chicago,* 588 F.3d 406, 409 (7th Cir. 2009). In Melgaard's case, the Letter's clear warning of future discipline meant termination could be imminent.

Negative performance review. Melgaard's negative performance review was also materially adverse. A reasonable employee would be dissuaded from supporting a charge of discrimination if he knew that he would be met with negative evaluations that could lead to serious job consequences, like termination. *See Burlington N.*, 548 U.S. at 67-68. Because "[c]ontext matters," *id.* at 69, that chilling effect is heightened for an employee in Melgaard's position, who had never once been investigated or received a negative performance review in twenty-seven years of service, *see* App. 370 ¶ 3, App. 382 ¶ 67.

The significance of a materially adverse action "depend[s] upon the particular circumstances." *Burlington N.*, 548 U.S. at 69. "[N]egative performance reviews, *unaccompanied* by tangible job consequences," may

not be materially adverse. *Boss v. Castro*, 816 F.3d 910, 919 (7th Cir. 2016) (emphasis added). But "[n]egative evaluations can … amount to adverse actions sufficient to support a retaliation claim." *Palermo v. Clinton*, 437 F. App'x 508, 511 (7th Cir. 2011). That's especially true when they are accompanied by "tangible job consequence[s]." *Scaife v. U.S. Dep't of Veteran Affs.*, 49 F.4th 1109, 1119 (7th Cir. 2022) (citation omitted). These consequences could be any action that "affects job opportunities, such as an opportunity for advancement, increased pay, overtime, or perks." *Trimble v. Alliance-DeKalb/Rock-Tenn Co.*, 801 F. Supp. 2d 764, 775 (N.D. Ill. 2011). His negative review warranted a meeting with program management and HR. App. 188. Here, the review threatened further consequences because a negative evaluation is the first step to more serious repercussions.

Defendants' subsequent conduct exacerbated, rather than dispelled, Melgaard's reasonable fears that the performance evaluation would lead to something worse. After receiving these negative ratings, Melgaard sought to correct the ratings and rebutted them to HR. App. 88-93. HR failed to conduct an independent review of the evaluation even though Department policy required one. App. 95-97, 181. HR also departed from Department policy by rejecting Melgaard's rebuttal without conducting any further inquiry. App. 95-97; App. 204 ¶ 90.

After HR arbitrarily rejected his rebuttal, Melgaard reasonably believed that, if these events continued, he could be terminated after

twenty-seven years of public service. App. 382 ¶¶ 71-72. Title VII protects plaintiffs, like Melgaard, "who decide[] to quit rather than wait around to be fired." *Bragg v. Navistar Int'l Transp. Corp.*, 164 F.3d 373, 377 (7th Cir. 1998).

Melgaard retired before he was terminated. To be actionable, the negative review did not need to concretely affect Melgaard's terms or conditions of employment. *See Lewis v. Wilkie*, 909 F.3d 858, 867 (7th Cir. 2018); *see also supra* at 40. A jury could conclude that Defendants' actions would dissuade a reasonable employee, facing possible loss of a job-related benefit, from supporting someone else's charge of discrimination. *See O'Neal*, 588 F.3d at 409.

Cumulative effect. The retaliatory actions just recounted can be considered independently, or their effect can be considered cumulatively. The district court improperly dismissed their cumulative effect, reasoning that, "[i]n the retaliation-claim context, courts generally consider each alleged retaliatory act to determine whether it is sufficiently adverse." App. 686 (citing *Lewis*, 909 F.3d at 868 n.3).

The district court is wrong because, as just explained, "[c]ontext matters" when assessing whether actions are materially adverse. *Burlington N.*, 584 U.S. at 69. "The real social impact of workplace behavior often depends on a *constellation of surrounding circumstances*, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Id.*

(emphasis added) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998)). If instances of possible retaliation must be understood in broader context, as *Burlington Northern* commands, it is difficult to understand how one could evaluate a "constellation" of retaliation by looking only at individual retaliatory stars.

So, because context matters, it follows that acts that "seem[] appropriate and nondiscriminatory when considered in isolation" may "bespeak retaliation when considered together." *McKenzie v. Ill. Dep't of Transp.*, 92 F.3d 473, 483 n.7 (7th Cir. 1996). This Court has permitted a claim involving retaliation in the aggregate, holding that "screaming, false disciplinary reports, mistreatment of [an employee's] daughter, exclusion from social functions, denial of time off, *etc.*" were a "litany of malfeasance" that "would certainly cause a reasonable worker to think twice about complaining about discrimination." *Huri v. Off. of the Chief Judge of the Cir. Ct. of Cook Cnty.*, 804 F.3d 826, 833 (7th Cir. 2015). Notably, *Huri* analyzed the cumulative retaliation separately from a parallel hostile-work-environment discrimination claim. *Id.* at 833-34.[3]

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[3] At least seven other circuits and the EEOC have adopted an approach in line with *McKenzie* and *Huri*. *See Rodríguez-Vives v. P.R. Firefighters Corps of P.R.*, 743 F.3d 278, 285 (1st Cir. 2014); *Hicks v. Baines*, 593 F.3d 159, 165 (2d Cir. 2010); *Brennan v. Norton*, 350 F.3d 399, 422 n.17 (3d Cir. 2003); *Laurent-Workman v. Wormuth*, 54 F.4th 201, 213 (4th Cir. 2022); *Haire v. Bd. of Supervisors of La. State Univ. Agric. & Mech. Coll.*, 719 F.3d 356, 368 (5th Cir. 2013); *Hubbell v. FedEx SmartPost, Inc.*, 933 F.3d 558, 570 (6th Cir. 2019); *Shannon v. Bellsouth Telecomms., Inc.*, 292 F.3d 712, 716 (11th Cir. 2002); EEOC Enforcement

Making no mention of *McKenzie* or *Huri*, the district court relied on a footnote from *Lewis*, 909 F.3d 858, which stated that, because the plaintiff "did not assert [a hostile-work-environment] claim," the court would look at the retaliatory acts "independently," rather than in the aggregate. *Id.* at 868 n.3; *see* App. 686. *Lewis* provides no reasoning for treating instances of retaliation independently; it just cites another case—*Boss v. Castro*, 816 F.3d 910 (7th Cir. 2016)—which, when analyzing a claim of *discrimination* (not retaliation), observed that the "totality of the circumstances approach" is "limit[ed]" to "hostile work environment claims." *Id.* at 918. But, as already discussed (at 39-41), Title VII created different statutory frameworks for discrimination and retaliation claims.

The district court's understanding of *Lewis* would create two significant problems. First, it would directly conflict with this Court's earlier precedent in *McKenzie*, 92 F.3d at 483 n.7, and *Huri*, 804 F.3d at 833. Where cases conflict, the earliest decision controls. *See Brooks v. Walls*, 279 F.3d 518, 522-23 (7th Cir. 2002).

Second, the district court's reading of *Lewis* cannot be squared with *Burlington Northern*'s emphasis on context. *See* 548 U.S. at 69. This Court should not "adhere[] to an approach that Supreme Court precedent

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Guidance on Retaliation and Related Issues, No. 915.004 (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues.

forecloses." *Fed. Trade Comm'n v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 767 (7th Cir. 2019). *Burlington Northern* requires a harm substantial enough, under all the circumstances, to deter a reasonable employee from taking a protected action. That is the principle this Court should apply.

3. Consideration of the COVID-19 investigation and Letter is not barred.

Below, Defendants argued that the COVID-19 investigation and Letter cannot be considered for two reasons. Both are wrong.

Settlement agreement. Defendants asserted that the prior settlement agreement between the Department and Melgaard bars any claim regarding the COVID-19 investigation. App. 324-27. That's incorrect. The settlement agreement does not bar claims, like the ones here, that arose after it was executed. App. 300 ¶ 13.

The settlement agreement was executed in January 2022. App. 301. At that point, Melgaard had been informed that no disciplinary action would be taken based on the investigation. App. 375 ¶ 25. So, at that point, there was no claim. But then, Melgaard's employer *did* take disciplinary action based on the investigation: Melgaard subsequently received a low rating based on events that underlay the investigation. *See* App. 79-80, 88-89.

"[E]ven though acts covered by the settlement agreement are not actionable, they may still be relevant as background evidence for the actionable claims." *Seung-Whan Choi v. Bd. of Trs. of Univ. of Ill.*, 2017

WL 3278823, at *7 (N.D. Ill. Aug. 2, 2017). Otherwise, an employer could settle a discrimination claim and then promptly retaliate with impunity because the employee would not be able to rely on pre-settlement conduct as context for a subsequently arising claim.

Timeliness. Defendants maintain that Title VII's time-bar prevents Melgaard from relying on the investigation or the Letter because he did not file a complaint with the state agency within 300 days. App. 327-28. That's also wrong. Claims "will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." *Nat'l R.R. Passenger Co. v. Morgan*, 536 U.S. 101, 122 (2002). "[D]istrict courts may not splinter a single employment practice even if claims based on some of the underlying conduct would no longer be timely on their own." *Ford v. Marion Cnty. Sheriff's Off.*, 942 F.3d 839, 849 (7th Cir. 2019).

To be sure, certain "[d]iscrete acts" of discrimination must be split up. *Morgan*, 536 U.S. at 114. But the Supreme Court made clear which specific actions those are: actions like "termination, failure to promote, denial of transfer, or refusal to hire." *Id.* "When *Morgan* ... speak[s] of a discrete act, [it] mean[s] a discrete claim of discrimination that is actionable by itself—what the Supreme Court has recently called a 'freestanding violation.'" *Lapka v. Chertoff*, 517 F.3d 974, 982 (7th Cir. 2008) (quoting *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 636 (2007)).

The investigation and the Letter aren't freestanding violations. Instead, they are part of a cumulative retaliatory campaign. A Title VII plaintiff can "get relief for time-barred acts by linking them with acts occurring within the limitations period." *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 353 (7th Cir. 2002); *see also Williams v. City of Chicago*, 325 F. Supp. 2d 867, 874 (N.D. Ill. 2004).

The negative performance review—which Melgaard received on September 30, 2022, and within the 300-day period required under Title VII—is linked to the earlier COVID-19 investigation and Letter. *See* App. 79. Harrenstein's negative ratings were expressly based on Melgaard's skepticism of the COVID-19 investigation and the Letter. App. 93.

And even if these events can't be considered substantively as part of the retaliatory pattern, Title VII does not "bar an employee from using the prior acts that fall outside the statute of limitations as background evidence in support of a timely claim." *Malin v. Hospira, Inc.*, 762 F.3d 552, 561 (7th Cir. 2014) (quoting *Morgan*, 536 U.S. at 113) (alterations omitted). Here, the investigation and Letter of Expectations illustrate a background pattern of escalating retaliation that provide context for Melgaard's negative review.

B. A jury could find that Melgaard's protected activity caused Defendants' adverse employment actions.

To support a Title VII retaliation claim, "a plaintiff must show but-for causation." *Adebiyi v. S. Suburban Coll.*, 98 F.4th 886, 892 (7th Cir.

2024). Causation can be inferred from "suspicious timing, ambiguous statements of animus, evidence other employees were treated differently, or evidence the employer's proffered reason for the adverse action was pretextual." *Rozumalski v. W.F. Baird & Assocs., Ltd.*, 937 F.3d 919, 924 (7th Cir. 2019) (citation omitted).

As we've explained (at 28-33), a jury could find a causal connection from suspicious timing, disparate treatment, and ambiguous justifications. As in the First Amendment context, each of these factors are relevant in the Title VII context. *See Lang v. Ill. Dep't of Child. and Fam. Servs.*, 361 F.3d 416, 419 (7th Cir. 2004) (inferring causation based on timing); *Adebiyi*, 98 F.4th at 894-95 (inferring causation from differential treatment); *Greengrass v. Int'l Monetary Sys. Ltd.*, 776 F.3d 481, 486-87 (7th Cir. 2015) (inferring causation from ambiguous statements). We have also already discussed (at 33-37) that Defendants' proffered non-retaliatory reasons are pretextual. The same pretext analysis applies in the Title VII context. The Department "did not enforce [these] rule[s] evenhandedly," *Coleman v. Donahoe*, 667 F.3d 835, 853 (7th Cir. 2012); "unusual[ly] deviat[ed] from standard procedures," *Baines v. Walgreens Co.*, 863 F.3d 656, 664 (7th Cir. 2017); and justified Melgaard's negative review with "dishonest explanation[s]," *Kulumani v. Blue Cross Blue Shield Ass'n*, 224 F.3d 681, 685 (7th Cir. 2000).

Conclusion

This Court should reverse the district court's grant of summary judgment to Defendants and remand for the district court to decide whether summary judgment is appropriate on Melgaard's First Amendment and Title VII claims. If this Court reaches the merits, it should hold that summary judgment is improper and that Melgaard's First Amendment and Title VII claims should go to trial.

Respectfully submitted,

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May 6, 2026

Certificate of Compliance

In accordance with Federal Rule of Appellate Procedure 32(g), I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) and Circuit Rule 32(c) because it contains 11,230 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016, set in Century Schoolbook in 14-point type.

/s/ Becca Steinberg

Becca Steinberg

Attached Appendix

Certificate of Circuit Rule 30 Compliance

In accordance with Circuit Rule 30(d), I certify that this appendix contains all of the materials required by Circuit Rule 30(a) and that the separately submitted appendix contains all of the materials required by Circuit Rule 30(b).

/s/ Becca Steinberg

Becca Steinberg

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MICHAEL MELGAARD,

Plaintiff,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES, BRYAN HARRENSTEIN, and JEREMY PEERY,

Defendants.

OPINION and ORDER

24-cv-561-jdp

Plaintiff Michael Melgaard was a lieutenant conservation warden for defendant Wisconsin Department of Natural Resources. Melgaard testified in support of his colleague's age and sex discrimination complaint against DNR, and he alleges that DNR retaliated against him because of it.

Melgaard brings First Amendment retaliation claims under 42 U.S.C. § 1983 against his supervisors at DNR, defendants Bryan Harrenstein and Jeremy Peery. He also brings a retaliatory hostile work environment claim against DNR under Title VII of the Civil Rights Act of 1964. He seeks compensatory and punitive damages.

Defendants move for summary judgment, Dkt. 26, and the court will grant their motion. Melgaard's First Amendment retaliation claims are barred by sovereign immunity because he seeks damages arising from his employment with the state. His Title VII claim fails on the merits because he has not shown that DNR's conduct was so severe or pervasive that it altered the terms and conditions of his employment.

BACKGROUND

In 2017, defendant Wisconsin Department of Natural Resources hired plaintiff Michael Melgaard as a lieutenant conservation warden for its Division of Public Safety and Resource Protection. In October 2020, Melgaard competed for a promotion to a captain regional warden position. One of Melgaard's coworkers also sought the promotion. Neither Melgaard nor his coworker received the promotion. Instead, defendant Bryan Harrenstein was promoted to captain and became Melgaard's immediate supervisor. Defendant Jeremy Peery became Harrenstein's supervisor. After Melgaard did not receive the promotion, he filed an age discrimination complaint against DNR with Wisconsin's Equal Rights Division. Melgaard's coworker also filed an age and sex discrimination complaint against DNR. Melgaard supported his coworker in her decision to file the complaint and in her prosecution of it.

Melgaard's decision to support his coworker's discrimination complaint is the protected activity at the core of this lawsuit. He contends that he was retaliated against for this protected activity in three ways: he was (1) investigated for possibly violating DNR's COVID-19 policies; (2) issued a Letter of Expectations explaining these policies and advising him of his work responsibilities; and (3) given a negative performance review, part of which referenced his violation of the COVID-19 policies.

A. Investigation

In the fall of 2021, following a lack of staff compliance with DNR's COVID-19 safety protocols, DNR decided that further reports of violations needed to be investigated. On November 15, 2021, a member of DNR leadership issued a memorandum to all conservation wardens stating that "employees traveling by motor vehicle must ride alone in vehicles," unless a safety issue made driving separately impossible. Dkt. 45, ¶ 52.

On November 16, 2021, Melgaard told Harrenstein over the phone that he was riding in a vehicle with another conservation warden. After the phone call with Melgaard, Harrenstein contacted Human Resources about Melgaard's potential violation of the COVID-19 policies. He spoke with Andrea Augle, an employment relations specialist, who determined that an investigation was warranted. DNR investigated Melgaard's conduct from mid- to late-December 2021. On January 2, 2022, Harrenstein, Augle, and Peery met regarding the investigation. They determined that no formal disciplinary action against Melgaard was necessary. The next day, Melgaard received a letter confirming DNR's decision.

B. Letter of Expectations

On February 4, 2022, DNR issued Melgaard a Letter of Expectations. These types of letters are not considered to be disciplinary, and they do not affect an employee's cumulative disciplinary record. Harrenstein drafted it. Melgaard's Letter of Expectations provided him additional guidance regarding DNR's COVID-19 policies and DNR's expectations for him in his supervisory role.

C. Performance review

On September 30, 2022, Harrenstein reviewed Melgaard's performance for the 2021–22 year. Melgaard received all "Solid Performance" and "Exceeds Expectations" ratings for the individual performance objectives. But he received "Progress Necessary" ratings for three DNR performance objectives, apparently a further consequence from the COVID-19 policy problem. To explain Melgaard's "Progress Necessary" rating, Harrenstein wrote: "During this review period Mike made a decision that went against guidance provided by Division/Dept. leadership. Mike did not take ownership of this decision when the mistake was addressed and attributed his mistake to unclear guidance." *Id.*, ¶ 136.

Melgaard filed a rebuttal to the performance review with the Bureau of Human Resources. He contended that the performance review contained inaccuracies and untrue claims, and he requested that the "Progress Necessary" ratings be changed to "Solid Performance" ratings. On December 23, 2022, the Bureau rejected Melgaard's rebuttal and determined that the performance review was justified.

On March 7, 2023, Melgaard emailed Harrenstein that he was retiring. Before Melgaard retired, Harrenstein conducted a final performance review for Melgaard. The final performance review included all "Successful Performance" ratings. Melgaard's last day of work at DNR was March 27, 2023. He officially retired on January 9, 2024.

The court will discuss additional facts as they become relevant to the analysis.

ANALYSIS

Melgaard brings First Amendment retaliation claims against Harrenstein and Peery under § 1983. He also brings a retaliation claim against DNR under Title VII. Melgaard contends that defendants took three actions against him in retaliation for supporting his coworker's discrimination complaint. Melgaard concedes that none of these actions are sufficient on their own to support a retaliation claim. But he argues that they had the cumulative effect of creating a retaliatory hostile work environment.

Defendants move for summary judgment on the entire complaint. Dkt. 26. This court will grant their motion if the material facts are undisputed and defendants are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The court will view the summary judgment evidence in the light most favorable to Melgaard and draw all reasonable inferences in his favor. *Lesiv v. Ill. Cent. R.R. Co.*, 39 F.4th 903, 908 (7th Cir. 2022). But it is Melgaard's burden to

provide sufficient evidence for a jury to return a verdict in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

A. First Amendment retaliation claims against Harrenstein and Peery

Defendants raise a threshold issue: whether Melgaard's First Amendment retaliation claims against Harrenstein and Peery are barred by sovereign immunity. *See* Dkt. 31, at 10–13. The court need not address the merits of Melgaard's First Amendment retaliation claims because the sovereign immunity issue is dispositive.

1. Sovereign immunity principles

Sovereign immunity is "the privilege of the sovereign not to be sued without its consent." *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 253 (2011). The Eleventh Amendment recognizes this privilege and generally prohibits private parties from suing states in federal court absent their consent. *See Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 520 (7th Cir. 2021); *Gerlach v. Rokita*, 95 F.4th 493, 498 (7th Cir. 2024).

There is an exception: Congress may abrogate the states' sovereign immunity by exercising its power under the Fourteenth Amendment to authorize such lawsuits. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999). Congress abrogated the states' sovereign immunity when it enacted Title VII. *See Nanda v. Bd. of Trs. of Univ. of Ill.*, 303 F.3d 817, 831 (7th Cir. 2002). But it did not do so when it enacted § 1983. *See Quern v. Jordan*, 440 U.S. 332, 342–44 (1979). As a result, states cannot be sued under § 1983 without their consent. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66–67 (1989).

A state's sovereign immunity extends to state officials when they are sued in their official capacity because those lawsuits are "against the official's office," and so, are "no different from a suit against the State itself." *Id.* at 71. In contrast, private parties can typically

sue state officials in their individual capacities without raising sovereign immunity concerns. *See Hafer v. Melo*, 502 U.S. 21, 31 (1991).

But even when private parties sue state officials in their individual capacities, courts must consider whether those claims "demonstrably [have] the identical effect as [claims] against the state." *Luder v. Endicott*, 253 F.3d 1020, 1023 (7th Cir. 2001) (emphasis omitted); *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984). Individual-capacity claims are effectively against the state when the state would (or should) pay a judgment in the plaintiff's favor. *See Gerlach*, 95 F.4th at 501; *Lenea v. Lane*, 882 F.2d 1171, 1178 (7th Cir. 1989). If a plaintiff's individual-capacity claims are effectively against the state, sovereign immunity bars those claims, *Luder*, 253 F.3d at 1023, and courts must dismiss them without prejudice, *see McHugh v. Ill. Dep't of Transp.*, 55 F.4th 529, 532–35 (7th Cir. 2022); *Morgan v. Fed. Bureau of Prisons*, 129 F.4th 1043, 1052 (7th Cir. 2025).

2. Seventh Circuit caselaw

A pair of Seventh Circuit cases illustrates the principle that individual-capacity claims are effectively claims against the state itself, and thus barred by sovereign immunity, when they seek to recover the benefits of state employment.

Consider first the Seventh Circuit's decision in *Omosegbon v. Wells*, 335 F.3d 668 (7th Cir. 2003). In that case, Indiana State University chose not to renew Omosegbon's contract as an untenured junior faculty member. *Omosegbon*, 335 F.3d at 671. As most relevant here, Omosegbon sued university officials in their individual capacities under § 1983, contending that they deprived him of his rights to due process and academic freedom. *See id.* at 671–73. The Seventh Circuit held that Omosegbon could not bring claims under § 1983 against these individuals in their individual capacities. *See id.* at 673. The court reasoned that Omosegbon

sought "backpay and other forms of monetary compensation based on an employment contract," and the university officials were not "parties to the contract in their individual capacity." *Id.* The court concluded that it was "inescapable that any resulting judgment will be paid by the state rather than the individual defendants," so Omosegbon's claims against the university officials were not bona fide individual-capacity claims. *Id.*

Second, consider the Seventh Circuit's decision in *Haynes v. Indiana University*, 902 F.3d 724 (7th Cir. 2018). The plaintiff in *Haynes*, an assistant professor at Indiana University, lost his bid for tenure. *Haynes*, 902 F.3d at 728. As most relevant here, Haynes sued university administrators in their individual capacities under 42 U.S.C. § 1981, contending that he was denied tenure because of his race. *See id.* at 729. The Seventh Circuit held that Haynes's individual-capacity claims against the university administrators were barred by sovereign immunity. *See id.* at 732. The court reasoned that *Haynes* was "materially the same" as *Omosegbon* because the university administrators "were not parties to Haynes's employment contract in their individual capacities," so the court had "no reason to believe that they, rather than the University, would foot the bill for a resulting judgment." *Id.*

This court recently applied *Omosegbon* and *Haynes* in its decision in *Hoffman v. Board of Regents of University of Wisconsin System*, No. 23-cv-853-jdp, 2025 WL 1504376 (W.D. Wis. May 27, 2025). The plaintiff in *Hoffman*, a white woman, was appointed as the interim director of the University of Wisconsin–Eau Claire's Multicultural Student Services department. *See Hoffman*, 2025 WL 1504376, at *1–2. Hoffman's supervisor removed her from this interim position after her appointment was criticized by students, faculty, and staff; Hoffman was also transferred to another department and removed as an instructor of a general education course. *See id.* at *2–3. As most relevant here, Hoffman sued the university's chancellor and its

affirmative action coordinator, asserting hostile work environment, discrimination, and retaliation claims against them under § 1981 and § 1983. *See id.* at *3. This court held that Hoffman's individual-capacity claims were barred by sovereign immunity. *See id.* at *4. This court reasoned that Hoffman's individual-capacity claims were "identical to *Omosegbon* and *Haynes* in all material respects, because she assert[ed] that [the chancellor] and [the affirmative action coordinator] denied Hoffman employment opportunities she would have received *from the state* in the absence of race discrimination." *Id.* at *5.

An underlying principle drives the sovereign immunity analysis in *Omosegbon*, *Haynes*, and *Hoffman*: sovereign immunity bars a state-employed plaintiff from bringing individual-capacity claims against state-employed supervisors or coworkers who deprived him of rights, benefits, or opportunities arising from his employment relationship with the state. In those circumstances, plaintiffs do not bring bona fide individual-capacity claims against individual defendants; instead, the claims are effectively against the state itself because they seek to recover the value of their state employment. The court will apply this principle to this case.

3. Application to Melgaard's case

Melgaard contends that Harrenstein and Peery retaliated against him for supporting his coworker's discrimination complaint, violating his First Amendment rights. *See* Dkt. 41, at 11–20. But Melgaard's substantive argument is that his employment relationship with the state entitled him to a retaliation-free work environment, and his work environment would have been free from retaliation if not for Harrenstein and Peery's actions. Melgaard's individual-capacity claims against Harrenstein and Peery are identical to those in *Omosegbon*, *Haynes*, and *Hoffman* in all material respects—Melgaard, a state employee, seeks damages from other state

employees because they interfered with his employment. As a result, his First Amendment retaliation claims against Harrenstein and Peery are barred by sovereign immunity. The court will dismiss those claims without prejudice.

Melgaard resists this conclusion for two reasons, neither of which are persuasive.

First, he contends that Wisconsin would be responsible for paying a judgment in his favor only because it has chosen to indemnify state employees. *See* Dkt. 41, at 7–9; Wis. Stat. § 895.46(1). Melgaard is correct that a state's decision to indemnify its employees, by itself, "does not transform a suit against individual defendants into a suit against the sovereign." *Benning v. Bd. of Regents of Regency Univs.*, 928 F.2d 775, 779 (7th Cir. 1991). The fact that a state indemnifies its employees is irrelevant to the sovereign immunity analysis "because it is the voluntary choice of the state, not a cost forced on it by the federal-court suit." *Luder*, 253 F.3d at 1023 (citations omitted). But even when states indemnify their employees, courts faced with individual-capacity claims against state employees still must consider whether the claims "may really and substantially be against the state." *Id.* If they are, then those claims are barred by sovereign immunity. *See Kraege v. Busalacchi*, No. 09-cv-352-vis, 687 F. Supp. 2d 834, 837 (W.D. Wis. 2009) (Crabb, J.).

Second, Melgaard contends that the individual-capacity claims in *Omosegbon* and *Haynes* were barred by sovereign immunity because the plaintiffs in those cases sought back pay, a form of equitable relief. *See* Dkt. 41, at 10–11. Melgaard says this case is different because he seeks only legal relief, namely compensatory damages for lost income, injury to his personal reputation, mental and emotional distress, as well as punitive damages. *See id.* But the type of relief doesn't matter. When a plaintiff's individual-capacity claims are effectively against the

state, claims for relief against the state are barred by sovereign immunity, even if that relief is compensatory in nature. *See Gerlach*, 95 F.4th at 500–01.

Melgaard's First Amendment retaliation claims against Harrenstein and Peery are barred by sovereign immunity. The court will dismiss those claims without prejudice.

B. Title VII claim against DNR

Melgaard purports to bring a retaliation claim against DNR under Title VII. *See* Dkt. 15, ¶ 503; Dkt. 41, at 26–28.[1] But he concedes that none of DNR's three actions were sufficiently adverse to support a Title VII retaliation claim on their own. *See* Dkt. 41, at 22. In the retaliation-claim context, courts generally consider each alleged retaliatory act to determine whether it is sufficiently adverse. *See Lewis v. Wilkie*, 909 F.3d 858, 868 n.3 (7th Cir. 2018).

But Melgaard wants the court to consider the cumulative effect of DNR's allegedly retaliatory actions. *See* Dkt. 41, at 27. *Lewis* suggests that the cumulative effect is best understood as a retaliatory hostile work environment claim rather than a retaliation claim. For a hostile work environment claim, the question is "whether the aggregate effect of all [three] incidents constituted a 'sufficiently severe or pervasive' hostile environment." *Lewis*, 909 F.3d at 868 n.3. Melgaard must show that DNR's actions were "so severe or pervasive so as to affect the terms and conditions of employment." *Johnson v. Advoc. Health & Hosps. Corp.*, 892 F.3d 887, 901 (7th Cir. 2018); *see Flanagan v. Off. of Chief Judge of Cir. Ct. of Cook Cnty.*, 893 F.3d 372, 375 (7th Cir. 2018) (per curiam).

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[1] In their opening brief, defendants say that "Melgaard intends to claim constructive discharge." Dkt. 31, at 30. But Melgaard disavows that he is bringing a constructive discharge claim in his opposition brief, describing the constructive discharge issue as strictly a remedies question. *See* Dkt. 41, at 28.

The terms and conditions of Melgaard's employment never changed. Melgaard received modest negative feedback three times after he violated a DNR policy. It is undisputed that (1) DNR determined that no formal disciplinary action was warranted following its investigation into Melgaard; (2) Melgaard's title, supervisory role, compensation, and benefits all remained the same following his Letter of Expectations; and (3) Melgaard's work responsibilities did not change, and he was not placed on an improvement plan after his negative performance review. No reasonable jury could find that three minor incidents over the course of ten months constituted the kind of severe and pervasive harassment that would affect the terms and conditions of Melgaard's employment. Melgaard's retaliatory hostile work environment claim fails.

ORDER

IT IS ORDERED that:

1. Defendants Wisconsin Department of Natural Resources, Bryan Harrenstein, and Jeremy Peery's motion for summary judgment, Dkt. 26, is GRANTED. Plaintiff Michael Melgaard's First Amendment retaliation claims against Harrenstein and Peery are dismissed without prejudice. Melgaard's retaliatory hostile work environment claim against DNR is dismissed with prejudice.

2. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered November 24, 2025.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MICHAEL MELGAARD,

Plaintiff,

v.

Case No. 24-cv-561-jdp

WISCONSIN DEPARTMENT OF NATURAL RESOURCES, BRYAN HARRENSTEIN, and JEREMY PEERY,

Defendants.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendants Wisconsin Department of Natural Resources, Bryan Harrenstein, and Jeremy Peery against plaintiff Michael Melgaard dismissing this case.

/s/ Deputy Clerk
Joel Turner, Clerk of Court

11/26/2025
Date